

ALLEGEDLY “BIASED,” “INTIMIDATING,” AND  
“INCOMPETENT” STATE COURT JUDGES AND THE  
QUESTIONABLE REMOVAL OF STATE LAW CLASS  
ACTIONS TO PURPORTEDLY “IMPARTIAL” AND  
“COMPETENT” FEDERAL COURTS—A HISTORICAL  
PERSPECTIVE AND AN EMPIRICAL ANALYSIS OF  
CLASS ACTION DISPOSITIONS IN FEDERAL AND  
STATE COURTS, 1925–2011

WILLY E. RICE\*

ABSTRACT

*Judges as well as members of plaintiffs’ and defense bars agree: a class action is a superior, efficient, and inexpensive procedural tool to litigate disputes that present similar questions of fact and law. To be sure, corporations and insurers have a long history of filing successful class actions against each other in state courts. Yet those corporate entities convinced Congress to embrace an uncommon view: continuing to allow allegedly “hostile” and “biased” state judges and juries to hear and decide everyday consumers’ “purely substantive state law class actions” is unfair and inefficient. Responding to the plea, Congress enacted the Class Action Fairness Act of 2005 (CAFA).*

*Reading CAFA’s purpose and findings, one discovers several questionable assumptions: (1) Out-of-state corporate defendants are more likely to lose consumer-initiated class actions in state courts, (2) allowing multinational insurers and corporations to remove consumers’ “purely state law class actions” to federal courts will increase efficiency between states’ and the federal judiciaries, and (3) federal judges are more “im-*

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\* Professor of Law, St. Mary’s University School of Law—San Antonio. M.A., Ph.D.—University of North Carolina at Chapel Hill; Postdoctoral Fellow—The Johns Hopkins University; J.D.—The University of Texas at Austin; and an American Bar Foundation Scholar. The author is forever indebted to Hubert M. “Tad” Blalock, David R. Heise, Donald E. Muir, Forrest W. Young, Francis A. Bottini, Jr., and Eugene R. Anderson for sharing their statistical and legal expertise with the author for numerous years. To be sure, their unselfish guidance and insight improved the Article. The author also thanks two audiences of practitioners, judges and colleagues who submitted invaluable comments and suggestions at forums in San Antonio and San Diego. Any errors or omissions are the author’s alone.

*partial” and significantly less likely to allow extralegal factors to influence the dispositions of class actions.*

*To determine whether reformers’ assumptions were sound, the author sampled, read, and coded 2,657 federal and state court class actions and ordinary decisions. This Article discusses the historical and empirical findings and provides evidence that refutes reformers’ assumptions about class action litigation in state and federal courts. Also, this Article questions the rationality of Congress’s sweeping removal reforms, which find no sound support in law or in fact. Moreover, this Article highlights several unintended consequences of class action reforms, which insurers and corporations are likely to regret. Finally, given that CAFA’s removal provisions are likely to undermine traditional principles of judicial federalism, this Article encourages the Supreme Court or, preferably, a more enlightened Congress, to address the concerns raised here as soon as the opportunity arises.*

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## INTRODUCTION

Opinion research consistently reveals that a wide spectrum of Americans fervently embrace the concept of federalism—the allocation and separation of powers between states and the federal government.<sup>1</sup> To be sure, federalism appears in a variety of flavors—constitutional,<sup>2</sup> political,<sup>3</sup> economic or regulatory,<sup>4</sup> fiscal,<sup>5</sup> and judicial.<sup>6</sup> Most often, numerous

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<sup>1</sup> Cf. Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 352 (2003) (“History clearly suggests ... [that] state and federal governments continue to compete for supremacy in the public’s eyes and that citizens have favored changes in the distribution of regulatory power when they have judged it to be in their best interest.”). There is more. In fact, in recent years, broad bipartisan coalitions of elected officials have fashioned legislation that would make it difficult for Congress to enact laws and for the executive branch to issue orders that would preempt states’ ability to regulate a broad range of activities, including the sale and distribution of drugs, the environment, health-related issues, and workers’ safety. See Stephen Labaton, *Anti-Federalism Measures Have Bipartisan Support*, N.Y. TIMES, Sept. 6, 1999, at A12; see also Federalism Accountability Act of 1999, S. 1214, 106th Cong.; Federalism Preservation Act of 1999, H.R. 2960, 106th Cong.

<sup>2</sup> See, e.g., Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 439–40 (2002) (observing that “[t]here is no agreed-upon definition of constitutional federalism. As a structural principle, federalism requires that power should be divided among layers of government. As the Constitution makes plain, the national government was designed to be one of limited powers, with central responsibilities retained for the states. Beyond these generalities lie deep disagreements about how precisely the federalism principle should be specified and implemented.”); Vince Lee Farhat, *Term Limits and the Tenth Amendment: The Popular Sovereignty Model of Reserved Powers*, 29 LOY. L.A. L. REV. 1163, 1164 n. 14 (1996) (defining “constitutional federalism” as “the political agenda of states’ rights, justified from the Tenth Amendment perspective.”); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 633 (1993) (observing that in “the United States of America, one might assume [that] there could be no question about the legal character of federalism. The very name suggests the federal character of what many Americans still refer to as ‘the Union.’ ... It is, therefore, notable that for most of the last half-century, the United States has had no constitutional law of federalism.”).

<sup>3</sup> See Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism,”* 27 GA. L. REV. 697, 710 n.78 (1993) (defining “political federalism” as “the balance of power between the political branches of the Federal Government and the States”).

<sup>4</sup> See, e.g., Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1232 (1997) (“The task of a well-articulated theory of regulatory federalism ... is to define the separate domains for federal antitrust rules on the one hand and state business regulations on the other.”); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 236–37, 241 (1987) (discussing how the roots of the state action doctrine are found in the values of economic federalism).

commentators and jurists devote a substantial amount of time and resources to discussing and questioning the Supreme Court's decisions surrounding regulatory, economic, and fiscal federalism.<sup>7</sup> But judicial federalism also generates a significant amount of controversy, analysis, and commentary. As an example, numerous legal scholars<sup>8</sup> have criticized federal judges for allegedly violating the *Erie* doctrine.<sup>9</sup> Still, other commentators have attacked federal courts of appeals and their panels for purportedly making too many *Erie* guesses when deciding diversity-of-jurisdiction disputes.<sup>10</sup>

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<sup>5</sup> See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2551 (2005) ("Fiscal relationships between federal and state governments ... operate in very different ways than do regulatory relationships. Most obviously, though regulatory federalism primarily seeks to define and protect separate zones of authority for the two levels of government, much of fiscal federalism addresses more subtle problems resulting when both levels are involved concurrently."). See generally WALLACE E. OATES, *FISCAL FEDERALISM* 19 (1972) (defining fiscal federalism and providing a thorough analysis of economic federalism).

<sup>6</sup> See *infra* notes 39–47, 49–59 and accompanying text.

<sup>7</sup> See Super, *supra* note 5, at 2551–62 and accompanying notes (presenting a thorough outline and discussion of the ongoing debate among various constitutional scholars and theorists about fiscal, regulatory and economic federalism). In addition, so-called "pure federalists" devote a lot of time questioning whether the federal government may regulate all commerce or whether the Commerce Clause gives the federal government superior power to regulate commerce even within the various states. See Matthew Søberg Shugart, *Constitution Day and Federalism*, FRUITS & VOTES (Sept. 16, 2005), <http://fruitsandvotes.com/?p=103> (defining "pure federalism" as "the existence of separate sovereign levels of authority ... that the founding fathers committed to parchment ... 218 years ago. But nowhere does this federal constitution require that Congress give money to the states without strings, or that it give money to the states at all."). See generally Mark Tushnet, *Federalism's Future—Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1634–50 (1994) (providing a general discussion of pure federalism and its limitations).

<sup>8</sup> See, e.g., Laurel E. Miller, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1390 (1991) (arguing that allowing a federal diversity court to dismiss a lawsuit—in which a state court applies its forum non conveniens law—would violate the *Erie* doctrine, "[b]ecause a forum non conveniens dismissal affects the suit's substantive outcome"); Carole A. Quinn and R. Scott Weide, *Violation of the Erie Doctrine: Application of a Rule of Federal Common Law to Issues of Patent License Transferability*, 32 CREIGHTON L. REV. 1121, 1141 (1999) (asserting that "those federal courts which have created and/or applied a 'federal rule' to resolve issues of patent license transferability have violated the *Erie* doctrine").

<sup>9</sup> See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938) (requiring federal courts to apply state supreme courts' decisions when determining questions of state law).

<sup>10</sup> See *id.* at 78 (requiring federal courts to make reasonable guesses about how states' supreme courts would decide certain questions of law if the latter courts have not considered or decided those questions); see also *Wentwood Woodside I, LP v. GMAC Com-*

According to critics, federal appellate courts should certify<sup>11</sup> arguably state law questions to state supreme courts rather than guess how state courts would interpret and/or apply state laws.<sup>12</sup>

On the other hand, the allegedly “biased,” “hostile,” “discriminatory,” “incompetent,” “unprincipled,” and “out-of-control” state court judges also received a sizeable amount of criticism.<sup>13</sup> In particular, both jurists and commentators have asserted that outrageous and unprincipled state court judges as well as plaintiffs’ lawyers are destroying the “fundamental principles” of judicial federalism.<sup>14</sup> To be sure, one can readily find these

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mercial Mortg. Corp., 419 F.3d 310, 323 (5th Cir. 2005) (“Neither the Texas Supreme Court, nor indeed any of the courts of Texas, has ever considered whether a plaintiff like Wentwood belongs to the class that section 4012a protects. We must, therefore, make an Erie ‘guess’ about how the Texas Supreme Court would answer this question.”); *Howe v. Scottsdale Ins. Co.*, 204 F.3d 624, 627 (5th Cir. 2000) (“To determine Louisiana law ... this [c]ourt should first look to final decisions of the Louisiana Supreme Court. If the Louisiana Supreme Court has not ruled on this issue, then this [c]ourt must make an ‘Erie guess’ and ‘determine as best it can’ what the Louisiana Supreme Court would decide.”).

<sup>11</sup> See, e.g., *Garcia v. Fed. Ins. Co.*, 473 F.3d 1131, 1136 (11th Cir. 2006) (stressing that a federal court should certify a question to the state supreme court—to avoid engaging in unnecessary speculation—when significant doubt exists about the answer to a material state law question). But see *Anderson v. Siemens Corp.*, 335 F.3d 466, 470 (5th Cir. 2003) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) and quoting TEX. R. APP. P. 58.1) (“It is within our discretion to certify a state law question to the relevant state supreme court. The Supreme Court of Texas may answer questions of law certified to it by a federal appellate court only if ‘the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent.’”).

<sup>12</sup> See, e.g., David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination*, 45 WM. & MARY L. REV. 157, 220 (2003) (“[S]ince the fraudulent transfer remedy is a routine feature of state law, equitable subordination might likewise be invoked as a matter of state law. Cases ... to the contrary should therefore be viewed as bad ‘Erie guesses’ as to the content of state law.” (footnotes omitted)); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679–80 (1992) (admitting that “state courts have found fault with a [significant] number of [the Third Circuit’s and district courts’] ‘Erie Guesses.’ Despite our best efforts to predict the future thinking of the state supreme courts within our jurisdiction on the basis of all of the available data, we have guessed wrong on questions of the breadth of arbitration clauses in automobile insurance policies, ... the availability of loss of consortium damages for unmarried cohabitants, ... the ‘unreasonably dangerous’ standard in products liability cases ... and the applicability of the ‘discovery rule’ to wrongful death and survival actions .... And this list is by no means exhaustive.” (footnotes omitted)).

<sup>13</sup> See *infra* notes 14, 21, 95, 348 and 617 and accompanying text.

<sup>14</sup> See, e.g., 151 CONG. REC. 1626, 1651 (2005) (statement of Sen. Orrin Hatch) (“[T]he minute the lawyers start talking about a class action and they send a demand letter, the companies know they are dead if the case is brought in Madison County, IL. No matter how right they may be, they are dead because the judges in that particular



latter sentiments if one reviews the ongoing, heated debates about the proper venues for various class actions.<sup>15</sup> More specifically, in recent years, class action reformers—primarily national and multinational corporations and insurance companies—have lobbied Congress intensely, encouraging that legislative body to move alleged “class actions of national importance” from state to federal courts.<sup>16</sup> According to reformers, class actions often involve complex legal and national-interest issues.<sup>17</sup> Thus, federal courts should have sole jurisdiction to hear “national class actions,” because (1) state court judges are allegedly prejudiced against out-of-state corporate defendants, and (2) only federal courts are sufficiently competent to adjudicate complex class action controversies.<sup>18</sup>

Fairly recently, embracing class action reformers’ arguments,<sup>19</sup> Congress enacted the Class Action Fairness Act of 2005 (CAFA).<sup>20</sup> Simply put, CAFA “federalizes” very large swaths of purely substantive state law class actions, and it allows corporate defendants to remove those so-called “class actions of national importance” to federal courts.<sup>21</sup> To repeat, in

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jurisdiction are in the pockets of the local lawyers with whom the out-of-State lawyers who have these class actions align themselves in order to go in there and get these outrageous verdicts that would not be obtained in any fair court of law.”).

<sup>15</sup> See, e.g., U.S. CHAMBER OF COMMERCE & U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *THE ROGUE COURTS OF MADISON COUNTY: A LEGAL ANALYSIS OF EGREGIOUS CASES IN THE COURTS OF MADISON COUNTY, ILL.*, 13–14 (2003) [hereinafter U.S. CHAMBER OF COMMERCE & U.S. CHAMBER INSTITUTE FOR LEGAL REFORM].

<sup>16</sup> See *NAMIC Supports President’s Commitment to Tort Reform*, INS. J. (Jan. 7, 2005), <http://www.insurancejournal.com/news/national/2005/01/07/49419.htm> (“‘We are extremely pleased to see the high priority President Bush is giving to the issue of legal reform,’ said National Association of Mutual Insurance Companies (NAMIC) Federal Affairs Senior Vice President, David A. Winston .... On class action reform Winston stated, ‘This is one of our top priorities .... Due to the dramatic increase in the filing of class action lawsuits in the U.S. in the last decade—many of which are frivolous—our member companies, as well as other businesses in other industries, have been forced to divert their valuable resources from their businesses.’”).

<sup>17</sup> See, e.g., U.S. CHAMBER OF COMMERCE & U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *supra* note 15, at 13.

<sup>18</sup> Cf. *infra* notes 78–79 and accompanying text.

<sup>19</sup> See *infra* notes 384–97 and accompanying text.

<sup>20</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

<sup>21</sup> See *Industry Basks in Class-Action Victory*, NAT’L UNDERWRITER P&C (Dec. 3, 2005), <http://www.propertycasualty360.com/2005/12/19/7-industry-basks-in-classaction-victory> (“For eight long years, the insurance industry battled on Capitol Hill to put a lid on what they considered to be an out-of-control tort system. With Republicans firmly in control of both houses of Congress and the White House, they finally were able to see at least one of their dream bills passed. Insurers were positively giddy when President George W. Bush signed the Class Action Fairness Act of 2005 into law. After all, the law moves a lot more cases into the more predictable federal courts, limits ‘venue shopping’ by trial



some quarters, a prevailing view exists: state court judges and juries are hostile to out-of-state corporate and non-corporate defendants.<sup>22</sup> Certainly, from the reformers’ perspective, the latter conditions are actual rather than imaginary perils of litigating class actions in state courts. Thus, according to corporate defendants and the defense bar, “national” class actions must be litigated in federal courts, where the litigation field is arguably more leveled for both out-of-state corporate defendants and in-state consumers-plaintiffs.<sup>23</sup>

In contrast, states’ righters acknowledge that both plaintiffs and defendants will confront various risks when litigating class actions in state courts; however, states’ righters insist: intentionally biased and hostile state court judges and juries are simply imaginary rather than actual risks of litigating class actions in state courts.<sup>24</sup> Furthermore, proponents of states’ rights argue that allowing out-of-state corporate defendants to remove truly substantive state law class actions to federal courts is a radical departure from commonly accepted notions of judicial federalism.<sup>25</sup> And opponents of class action reforms insist that removing the majority of class actions from allegedly hostile and discriminatory state courts to federal courts severely undermines the separation of powers between federal and state courts.<sup>26</sup>

Positively, class action reforms in general and the long term effects of CAFA in particular are important topics. Thus, CAFA will be discussed necessarily and briefly at relevant points throughout this Article. But it is important to emphasize that CAFA is not the central focus of this Article. Quite simply, the literature is replete with CAFA-related articles.<sup>27</sup> In-

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lawyers seeking friendly jurisdictions (called ‘judicial hellholes’ by the industry), and places limits on state class actions.”).

<sup>22</sup> See, e.g., U.S. CHAMBER OF COMMERCE & U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *supra* note 15, at 11.

<sup>23</sup> See, e.g., *id.* at 10.

<sup>24</sup> See discussion *infra* Part II.A and accompanying notes.

<sup>25</sup> See *infra* notes 49–59 and accompanying text.

<sup>26</sup> See *infra* notes 49–59 and accompanying text.

<sup>27</sup> A search on May 4, 2011 generated nearly two hundred CAFA-related articles. See, e.g., Diane B. Bratvold & Daniel J. Supalla, *Standard of Proof to Establish Amount in Controversy when Defending Removal Under the Class Action Fairness Act*, 36 WM. MITCHELL L. REV. 1397, 1401 (2010) (discussing a circuit split over the standard of proof for determining the amount in controversy in CAFA removal cases); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1445 (2008) (presenting a pre- and post-CAFA description of the jurisdictional rules governing federal diversity class action litigation); Alexander Lemann, *Sheep in Wolves’ Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 COLUM. L. REV. 121, 123 (2011) (examining the applicability of

stead, this Article presents a fairly comprehensive discussion as well as an empirical analysis of a persistent, poorly studied, and divisive question: whether allegedly biased state court judges and juries have a greater propensity to decide against out-of-state corporations and insurers who are defendants in state law class actions.

Stated more succinctly, this Article addresses two major questions: (1) whether in-state and out-of-state litigants are significantly more or less likely to “win” state law class actions in state courts or in federal courts, and (2) whether state court judges or federal judges are significantly more or less likely to allow impermissible, discriminatory or extralegal factors influence the disposition of class actions in state and federal courts, respectively. Perhaps answers to these questions will shed some light on the more general question: whether purportedly “incompetent and biased” state judges and juries are significantly more likely to resolve class actions differently than allegedly “more competent, unbiased, and less hostile” federal judges and juries.

Thus, Part I discusses, extremely briefly, judicial federalism. Necessarily, this succinct discussion will focus on the Framers of the Constitution’s intent when they adopted a federalist system that allocates power, establishes a division of labor, and creates checks and balances between state and federal judiciaries. But even more importantly, Part II highlights and discusses the proven risks and the imaginary perils of litigating actions generally and class actions particularly in purportedly “impartial” federal courts and allegedly “hostile and biased” state courts. Finally and inescapably, the closing discussions in Part II focus, briefly, on the following procedural issues: (1) the scope of federal courts’ jurisdictional powers to hear diversity actions between parties from different states, (2) the scope of allegedly “unprincipled” and “prejudiced” state court judges’ power and expertise to hear disputes between citizens and noncitizens who reside within the borders of a state, and (3) the extent of both federal and state court judges’ legal competence to certify and adjudicate various class actions judiciously and efficiently.

When Congress was debating whether class action reforms were necessary, a significant split emerged among legislators. Some asserted that enacting CAFA would severely undermine the Framers’ intent regarding

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the Class Action Fairness Act’s removal provisions to *parens patriae* suits); Adam N. Steinman, “Less” Is “More”? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act’s Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1189 (2007) (summarizing CAFA’s jurisdictional and appellate provisions).

judicial federalism.<sup>28</sup> Others maintained that class action reforms would restore the “proper” allocation of powers between state and federal courts.<sup>29</sup> Therefore, Part III presents a short overview of CAFA’s stated purposes and a discussion of that act’s controversial provisions regarding the proper venue for litigating supposedly “class actions of national importance.”

In addition, using CAFA as a point of reference, Part III outlines the insurance industry and insured corporate entities’ ostensible reasons for using their substantial political clout and financial resources to help enact CAFA. As mentioned earlier, class action litigation is plagued with substantial perils, regardless of whether the actions commence in supposedly “unfriendly” and “prejudicial” state courts, or in professedly “impartial” and “highly proficient” federal courts.<sup>30</sup> Yet, during the 2005 congressional debates over whether to enact class action reforms, the powerful insurance industry and other class action reformers also cited many arguably fictitious perils, pitching them to justify allowing out-of-state, corporate defendants to remove purported “national class actions” from allegedly “biased” state courts to federal courts.<sup>31</sup>

Why would national insurers and their insured corporate clients introduce lists of arguably fictitious perils into the class action debate? Were the insurers truly interested in eradicating allegedly “biased” and “hostile” state court proceedings, or were the insurers and insured corporations determined to “turn 200 years of judicial federalism on its head”? Since the latter has been suggested, Part III also focuses more closely on insurers’ critical role in helping to remove purely substantive state law class actions from state to federal courts.

As discussed more fully in Part IV, corporations as well as insurance companies have a long history of filing class action lawsuits among themselves.<sup>32</sup> Thus, even a cursory examination of case law and the legal literature demonstrates that whether a class comprises similarly situated consumers, corporations, or insurance companies, class representatives and

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<sup>28</sup> Michael D. Y. Sukenik & Adam J. Levitt, *CAFA and Federalized Ambiguity: The Case for Discretion in the Unpredictable Class Action*, 120 YALE L.J. ONLINE 233, 235–36 (2011).

<sup>29</sup> John Stevens, *Securing “Steady, Upright and Impartial Administration of the Laws”—The Federalist-Based Imperative for Class Action Reform*, 3 GEO. J.L. & PUB. POL’Y 361, 377 (2005).

<sup>30</sup> See, e.g., *id.* at 372.

<sup>31</sup> See, e.g., U.S. CHAMBER OF COMMERCE & U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *supra* note 15, at 2, 4.

<sup>32</sup> See Ross E. Cheit & Jacob E. Gersen, *When Businesses Sue Each Other: An Empirical Study of State Court Litigation*, 25 LAW & SOC. INQUIRY 789, 790 (2000).

counsels must prepare for and confront numerous serious perils in federal courts.<sup>33</sup> Also, as discussed in Part IV, some of the procedural hurdles include inter-circuit conflicts over the criteria for determining jurisdiction, conflicting interpretations of class certification rules, inter- and intra-circuit conflicts over the proper choice of law rules under the *Erie* doctrine, *Erie*-guessing problems, and conflicts over whether federal district courts must apply state laws, the laws of a specific federal circuit, or the laws of a specific panel within a federal circuit.<sup>34</sup>

Arguably, CAFA's fairly new jurisdictional and removal rules will increase rather than reduce the numbers of known procedural and substantive hurdles that class action litigants presently face in federal courts. Therefore, Part IV presents a fairly brief discussion of some possibly unintended, post-CAFA consequences that corporate plaintiffs are likely to encounter when they commence class actions in federal courts. Part IV also discusses some unexpected perils that insurance companies are likely to come across in a post-CAFA era as class action plaintiffs and defendants in federal courts.

Part V is the final section in this Article. It presents the results of an empirical study of class action cases litigated in federal and state courts between 1925 and 2011. These results were compiled in a database. As reported in Part V, the database reveals that disgruntled consumers and third-party victims filed class actions in both state and federal courts against a large assortment of national and multinational insurance companies, insured corporations, businesses, and public and private institutions.<sup>35</sup> Thus, in Part V, several important statistical findings are reported. For example, when comparing class action defendants and plaintiffs' likelihoods of success, the results are clear: multinational insurance companies and other corporate defendants have a greater likelihood of "winning" class actions in allegedly "hostile," "biased," and "incompetent" state courts.<sup>36</sup> But even more relevant, the study reveals: either consciously or unconsciously, allegedly "impartial" federal judges as well as purportedly "biased" state court judges permit extra-legal or irrelevant factors—like

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<sup>33</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)) ("[F]ederal standing requires an allegation of a present or immediate injury in fact, where the party requesting standing has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.'").

<sup>34</sup> See *infra* notes 459–83 and accompanying text; see also Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat 4, 5.

<sup>35</sup> See *infra* Part V.

<sup>36</sup> See *infra* Part V.C.

the geographic location of the deciding court and the legal statuses of class action complainants—to influence class action outcomes.<sup>37</sup>

Finally, as of this writing, CAFA’s removal and jurisdictional rules have begun to generate serious intra-circuit and inter-circuit conflicts among federal courts.<sup>38</sup> Therefore, this Article concludes by inviting the Supreme Court to seize the opportunity to review one or several of those procedural conflicts. And, in light of the empirical findings and historical analysis reported in this Article, the author encourages the Court to declare that CAFA’s removal rule is constitutionally overboard, because (1) the jurisdictional procedural rule evolved in whole part from a set of beliefs and conclusions which have no firm foundation in fact or in law; and (2) the “case of national importance” procedural rule interferes excessively and unreasonably with state court judges’ long recognized authority, competence, judiciousness, and efficiency to hear and decide class actions involving purely substantive state law disputes.

#### I. A BRIEF OVERVIEW: THE FRAMERS OF THE CONSTITUTION AND JUDICIAL FEDERALISM

“Fundamental principles of federalism” is a phrase that appears frequently in reported cases,<sup>39</sup> the Congressional Record,<sup>40</sup> and legal litera-

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<sup>37</sup> See *infra* Part V.D.

<sup>38</sup> See *infra* Part V.E.

<sup>39</sup> See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“[T]he Qualifications Clauses are exclusive.... [I]t is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system. The dissent’s course of reasoning suggesting otherwise might be construed to disparage the republican character of the National Government, and ... that course of argumentation runs counter to fundamental principles of federalism.”); *United States v. Martinez-Cortez*, 354 F.3d 830, 833 (8th Cir. 2004) (Lay, J., dissenting) (“The majority opinion fails to address the fundamental principles of federalism and deference owed by federal courts to state courts in processing their own criminal cases.”); *Benjamin v. Jacobson*, 172 F.3d 144, 184 (2nd Cir. 1999) (concluding that a lower federal court offends the most fundamental principles of federalism when that tribunal attempts improperly to decide a purely a question of state law); *Bell v. Hill*, 190 F.3d 1089, 1093 (9th Cir. 1999) (Rymer, J., dissenting) (arguing that issuing a federal writ of habeas corpus to a state court—merely on the basis of the Ninth Circuit’s case law—violates fundamental principles of federalism); *People v. Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975) (“[T]he California Constitution is, and always has been, a document of independent force. Any other result would contradict not only the most fundamental principles of federalism but also the historic bases of state charters.”).

<sup>40</sup> See, e.g., 151 CONG. REC. 1796, 1821 (2005) (statement of Sen. Chuck Grassley) (“The amendment, in short, is a radical attempt to avoid the fact that in some areas Congress has chosen to leave the decision of what substantive law should govern conduct to

ture.<sup>41</sup> Some commentators argue that the Framers developed and inserted fundamental principles of federalism conspicuously in the Constitution.<sup>42</sup>

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the legislative process of each state. By having judges dismiss the laws of all states but one, the Public Citizen amendment violates fundamental principles of federalism.”); 150 CONG. REC. S8055, 8071 (daily ed. July 14, 2004) (statement of Sen. Wayne Allard) (citing JOSHUA K. BAKER, *IS DOMA ENOUGH? AN ANALYSIS*, INST. FOR MARRIAGE & PUB. POLICY (2004) (“Many legal analysts argue that a constitutional amendment that creates a national definition of marriage violates fundamental principles of federalism.”)); 146 CONG. REC. 2899, 2912 (2000) (statement of Rep. Sherwood Boehlert) (“Mr. Chairman, I rise in strong opposition to this bill. The detrimental effects of [the Private Property Rights Implementation Act of 2000] are likely to be felt by virtually every citizen in virtually every community in this country.... [T]his bill disempowers citizens and their towns and cities and counties, and skews local zoning rules to give developers the upper hand. It removes the incentive to negotiate zoning disputes, replacing that incentive with the threat of federal court review.... Let us not take power away from citizens and localities. Let us not overturn the fundamental principles of federalism.”).

<sup>41</sup> See, e.g., Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1361 (2006) (reporting that the United States ratified the U.N. Convention Against Transnational Organized Crime but attached a reservation that preserved the nation’s “fundamental principles of federalism”); Michelle Lawner, *Why Federal Courts Should Be Required to Consider State Sovereign Immunity Sua Sponte*, 66 U. CHI. L. REV. 1261, 1270 (1999) (asserting that “fundamental principles of federalism ... compel the Court to protect state sovereignty”); Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2032 (2001) (rejecting the notion that state attorneys general violate fundamental principles of federalism and separation of powers when they prosecute multistate cases); Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2688 (2004) (arguing that the Defense of Marriage Act “abuses the Full Faith and Credit Clause and contravenes fundamental principles of Federalism”).

<sup>42</sup> See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838–39 (1995) (Kennedy, J., concurring) (“[I]t seems appropriate to add these few remarks to explain why [the dissenter’s] course of argumentation runs counter to fundamental principles of federalism. Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.”); Adam Nagourney, *G.O.P. Right Is Splintered on Schiavo Intervention*, N.Y. TIMES, Mar. 23, 2005, at A14 (“[Congress’s vote to allow] ... federal courts to take over the Terri Schiavo case has created distress among some conservatives who say that lawmakers violated a cornerstone of conservative philosophy by intervening in the ruling of a state court.... David Davenport of the [conservative] Hoover Institute [stated] ... ‘[Congress’s intervention] really is a violation of federalism.’ ... Some more moderate Republicans are also uneasy. Senator John W. Warner of Virginia, the sole Republican to oppose the Schiavo bill ... said: ‘This



Other constitutional scholars, however, disagree.<sup>43</sup> While acknowledging that a core set of principles generally allocate jurisdictional powers between the states and branches of the federal government, many jurists stress that judicial interpretations of the Constitution,<sup>44</sup> congressional statutes<sup>45</sup> and the executive branch’s policies<sup>46</sup> have created and shaped our ever evolving principles of federalism. Once more, there are several types and theories of federalism, and imaginative commentators are forev-

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senator has learned from many years you’ve got to separate your own emotions from the duty to support the Constitution of this country. These are fundamental principles of federalism.”).

<sup>43</sup> See Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 9–10 (2004) (“Both the text and historical understandings of the Constitution plainly contemplate balance between national and state power .... [But while the] text and history of the Constitution are important starting points ... they are necessarily incomplete guides; after all, that incompleteness is the major reason we turn to doctrinal development.”).

<sup>44</sup> See, e.g., Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–27 (2000) (“[T]he Constitution has often proved more enlightened and enlightening than the case law glossing it.... The document, of course, must be interpreted ... [The documentarians] seek inspiration and discipline in the amended Constitution’s specific words and word patterns, the historical experiences that birthed and rebirthed the text, and the conceptual schemas and structures organizing the document.... [The doctrinalists do not attempt to comb] meaning from constitutional text, history, and structure. Instead, they typically strive to synthesize what the Supreme Court has said and done ... in the name of the Constitution.... Judges have often transformed sound and widely accepted constitutional principles into normatively insensitive or outlandish lines of case law.”); see also *Printz v. United States*, 521 U.S. 898, 905 (1997) (concluding that a federal statute—which compelled state officers to execute federal laws—was unconstitutional and observing that although “no constitutional text [covered or addressed the] precise question, the answer ... must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court”).

<sup>45</sup> See Young, *supra* note 43, at 9 (“Congress stakes its claim to regulate certain aspects of life while eschewing others and ... creates mechanisms of shared state and federal responsibility.”).

<sup>46</sup> See, e.g., Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 827–29 (2004) (“In *American Insurance Association v. Garamendi*, the U.S. Supreme Court invalidated California’s Holocaust Victim Insurance Relief Act (HVIRA), which required insurance companies doing business in California to disclose all policies they or their affiliates sold in Europe between 1920 and 1945. According to the Court, the state’s law unconstitutionally interfered with the foreign affairs power of the national government.... The Court’s conclusions in *Garamendi* ... come as something of a surprise, for ... the essence of the decision is that the President, at least in some circumstances, does have this preemptive power in foreign affairs.... The final outcome ... was that a state law fell, not because the law was in itself unconstitutional, but because the executive branch disagreed with it as a policy matter.” (footnotes omitted)).

er creating novel theories about federalism and the Framers' intent.<sup>47</sup> But those numerous theories will not be discussed here. Instead, this Part presents a very brief and necessary discussion about judicial federalism, another branch of the separation of powers doctrine.<sup>48</sup>

Briefly put, Article III of the Constitution<sup>49</sup> created a federal judiciary, and it gives the Supreme Court and lower federal courts powers to resolve constitutional as well as federal statutory and regulatory disputes.<sup>50</sup> In addition, depending on the status of the parties in a legal action, the Judiciary Act of 1789<sup>51</sup> gives the federal judiciary additional powers and jurisdiction over states and their citizens.<sup>52</sup> But state courts also have power to hear and resolve controversies. Therefore, one might ask: what are the unique parameters of judicial federalism? At the outset, it is worth men-

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<sup>47</sup> See Adam M. Giuliano, *Emergency Federalism: Calling on the States in Perilous Times*, 40 U. MICH. J.L. REFORM 341, 345 (2007) (discussing the Framers' intent and assessing "what the Constitution says [about how] emergency federalism might apply to the War on Terror and homeland security"); Robert B. Thompson, *Corporate Federalism in the Administrative State: The SEC's Discretion to Move the Line Between the State and Federal Realms of Corporate Governance*, 82 NOTRE DAME L. REV. 1143, 1144 (2007) (discussing how state regulators abrogated their duties and allowed federal regulators to expand corporate governance rules and the obligations of officers and directors).

<sup>48</sup> See Thomas E. Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. REV. 835, 842-44 (1995) ("From the earliest days of the Republic, the judicial inquiry has always been two-dimensional. The scope of the federal judicial power always is determined, first, by examining Article III of the Constitution and, second, by interpreting the particular enabling act of Congress.... The constitutional principle of separation of powers is evident in the resolution of issues of federal court jurisdiction.... Like separation of powers, the principle of federalism is not found in so many words in the text but nonetheless is an essential part of the Constitution's structure." (footnotes omitted)).

<sup>49</sup> U.S. CONST. art. III.

<sup>50</sup> Article III, Section 1 of the Constitution provides for original jurisdiction in the Supreme Court. It reads in pertinent part:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall ... receive ... a Compensation, which shall not be diminished during their Continuance in Office.

*Id.* § 1.

<sup>51</sup> Judiciary Act of 1789, 1 Stat. 73 § 12.

<sup>52</sup> The Judiciary Act of 1789 confirms the Supreme Court's powers and states: [T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.

*Id.* § 13.

tioning that judicial federalism in America is multifaceted. First, it is a two-pronged system that comprises federal and state judiciaries,<sup>53</sup> and, within each judiciary, one finds a hierarchy of courts that have specific and limited jurisdictional powers.<sup>54</sup>

Second, even though it is a dual system, judicial federalism “means different things in different contexts.”<sup>55</sup> The Supreme Court’s policing the “boundaries of power between federal and state [courts],” limiting and interpreting congressional powers under various federal statutes or preventing Congress from violating the constitution and its amendments all comprise one meaning of judicial federalism.<sup>56</sup> Judicial federalism, however, also means ensuring the existence of a stable and “fully developed dual court system” that is efficient and impartial,<sup>57</sup> instituting democratic procedures to select, elect, and retain judges in both judiciaries, accepting the principle that the Supreme Court may police state courts’ federal-law rulings, and, even more importantly, acknowledging that state courts are indeed competent to adjudicate federal questions of law.<sup>58</sup>

To reiterate, judicial federalism includes state and federal courts’ respecting each other’s powers and competencies to try and award remedies in cases that involve both federal and state questions of law.<sup>59</sup> But note: as plaintiffs or as defendants, many national insurers and their insured—national and multinational corporations, partnerships and other medium-to-large conglomerates—have embraced or fashioned arguably a difficult conundrum regarding whether state courts or federal courts are the proper forums to litigate state law disputes.<sup>60</sup> On some occasions, large out-of-

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<sup>53</sup> See William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1176 (1996) (“American federalism also finds expression in our legal system, with its dual set of federal and state courts.... But just as there is no fundamental norm to [help us to understand] federalism in general, no overarching neutral principle defines the contours of judicial federalism .... since.”).

<sup>54</sup> See, e.g., U.S. CONST. art. III, § 1; Judiciary Act of 1789 § 13.

<sup>55</sup> See Michael E. Solimine, *Judicial Federalism After Bush v. Gore: Some Observations*, 23 JUST. SYS. J. 45, 47 (2002).

<sup>56</sup> *Id.* at 47.

<sup>57</sup> Robert A. Schapiro, *Dual Enforcement of Constitutional Norm Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & MARY L. REV. 1399, 1399 (2005).

<sup>58</sup> Solimine, *supra* note 55, at 47.

<sup>59</sup> See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1142 n.1 (1988).

<sup>60</sup> Compare Charles D. Weller, *The McCarran-Ferguson Act’s Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587, 590 (1978), with U.S. CHAMBER OF COMMERCE & U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *supra* note 15, at 13–14.

state and in-state insurance companies champion state courts' right and power to decide controversies in which insurers and/or their corporate clients are defendants.<sup>61</sup> During those moments, national and multinational insurers routinely cite states' jurisdictional powers under the McCarran-Ferguson Act,<sup>62</sup> and fight fiercely to litigate mixed-claims, state substantive law and/or federal substantive law controversies in state courts.<sup>63</sup>

On other occasions, when those same insurers and their insured corporate clients "think" or "believe" that they are victims of state courts' allegedly biased proceedings or discriminatory rulings, those corporate defendants frequently fight to remove general actions and class actions from state to federal courts.<sup>64</sup> Furthermore, during those episodes, corporate defendants often accuse state courts of being incompetent to decide mixed federal and state controversies.<sup>65</sup> And those national and multinational insurers and corporations also insist that state courts are "hostile" forums because state court judges allegedly redefine, undermine or destroy settled principles of judicial federalism.<sup>66</sup> Without a doubt, these and similar arguments were presented extremely effectively before Congress during its debate over CAFA, an act that allows corporate defendants to remove large percentages of state substantive law class actions from various state courts to federal courts.<sup>67</sup>

## II. ALLEGEDLY "BIASED" STATE COURT JUDGES AND "CORRUPT STATE COURT PROCEEDINGS" VERSUS THE REAL PERILS OF LITIGATING IN STATE AND FEDERAL COURTS

Long before the Constitutional Convention adopted the United States Constitution in 1787 and the original states' ratification,<sup>68</sup> there were state

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<sup>61</sup> See Weller, *supra* note 60, at 590.

<sup>62</sup> 15 U.S.C. §§ 1011–1015 (1945); *see also infra* notes 279–347 and accompanying text.

<sup>63</sup> *See infra* notes 279–347 and accompanying text.

<sup>64</sup> *See, e.g.,* U.S. CHAMBER OF COMMERCE & U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *supra* note 15, at 9.

<sup>65</sup> *See, e.g., id.* at 3.

<sup>66</sup> *See, e.g., id.* at 13–14.

<sup>67</sup> *See generally id.* (offering many, if not all, of these arguments two years prior to the passage of CAFA).

<sup>68</sup> *See* State v. Neufeld, 926 P.2d 1325, 1345 (Kan. 1996) (reporting that a Constitutional Convention framed the United States Constitution in Philadelphia in 1787, all representatives of the original states except Rhode Island adopted and signed the Constitution on September 17, 1787 and eleven states ratified the Constitution by August 1788).

courts.<sup>69</sup> Those courts tried cases and issued an assortment of rulings under state constitutions and statutes as well as under English and American common law.<sup>70</sup> But even more relevant, nearly ninety years after the original states ratified the Constitution, diverse parties litigated federal claims and causes of action primarily in state courts, because inferior federal courts did not have general jurisdiction to try such cases.<sup>71</sup>

Under the Constitution, the judicial power of the federal government extends “to all Cases, in Law and Equity, arising under ... the Laws of the United States” and “to Controversies...between a State and Citizens of another State.”<sup>72</sup> And, under the Judiciary Act of 1789,<sup>73</sup> federal courts have jurisdiction over controversies between citizens of different states or between a citizen of a state and an alien.<sup>74</sup> As some constitutional scholars have reported, neither the Constitutional Convention’s debates nor the

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<sup>69</sup> See Luke Bierman, *From the Benches and Trenches—Three Views of State Appellate Courts*, 26 JUST. SYS. J. 91, 91 (2005) (noting that some state courts have a very long history that predates the federal judiciary); Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1073 (1998) (“[Although] detailed information about the agenda of early state courts [is absent for various reasons] .... the early courts rendered far reaching decisions, especially on matters that would now be characterized as raising constitutional questions.”).

<sup>70</sup> See PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 1 (1996) (reporting that some original states adopted state constitutions between 1776 and 1787 that later became models for the United States Constitution).

<sup>71</sup> See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 320 (5th ed. 2003).

<sup>72</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>73</sup> Judiciary Act of 1789, 1 Stat. 73 § 11 (current version at 28 U.S.C. § 1332 (2006)).

<sup>74</sup> Section 11 of the Judiciary Act of 1789 states:

[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Judiciary Act of 1789 § 11. The Judiciary Act of 1875 removed the requirement that one of the parties be a citizen of the forum state, and gave jurisdiction of all suits in which the jurisdictional amount was met and “in which there shall be a controversy between citizens of different States, or ... a controversy between citizens of a State and foreign States, citizens, or subjects ....” Judiciary Act of 1875, 18 Stat. 470 § 2.

First Congress's records explain why the Constitution and the Judiciary Act award "diversity jurisdiction"<sup>75</sup> to federal courts.<sup>76</sup>

One fact, however, is unquestionable: since the nation ratified the Constitution and embraced federalism in its various forms, tensions between federal and state judiciaries have been very real and pronounced.<sup>77</sup> And, even though state courts have been highly competent to hear and decide federal-law causes of action for centuries,<sup>78</sup> debates persist in the literature and, more recently, in Congress, over whether state courts are competent, dispassionate, and reliable enough to decide federal claims or causes.<sup>79</sup>

Certainly litigants must confront and prepare for known procedural and substantive legal barriers if they expect to prevail in either state or

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<sup>75</sup> Although 28 U.S.C. § 1332(a) extends federal courts' jurisdiction to suits between "citizens of different states," "diversity jurisdiction" embraces both diversity actions and alienage cases.

<sup>76</sup> See CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3601 (3d ed. 2011).

<sup>77</sup> Cf. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662–63 (1978) (recognizing that duplicative litigation in as well as concomitant tension between state and federal courts are major concerns and "as the overlap between state claims and federal claims increased, this Court soon recognized that situations would often arise when it would be appropriate to defer to the state courts"); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 (1973) (Brennan, J., dissenting) (observing that "uncertainty of the standards creates a continuing source of tension between state and federal courts" and suggesting "[t]he problem is ... that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.").

<sup>78</sup> See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."). But see *Testa v. Katt*, 330 U.S. 386, 393 (1947) (reaffirming the principle that a state court cannot "refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers") (internal quotation marks omitted).

<sup>79</sup> Compare 151 CONG. REC. 2631, 2652 (2005) (statement of Rep. William Delahunt) ("[W]e have before us [the Class Action Fairness] bill that would sweep aside generations of State laws that protect consumers. Citizens will be denied their basic right to use their own State courts to file class action lawsuits against companies."), with *id.* at 2092 (statement of Sen. Christopher Dodd) ("Article III of [the Constitution] extends Federal jurisdiction to suits between 'citizens of different States.' The purpose of extending this 'diversity jurisdiction' to citizens is to prevent the citizens of one State from being discriminated against by the courts of another State. However, over the years, this purpose has been increasingly thwarted by clever pleading practices of enterprising class action attorneys.").



federal courts. Thus, this realization generates no serious debate because predictable legal hurdles affect both in-state and out-of-state litigants.<sup>80</sup> There is, however, a broader concern: whether state and federal courts are equally competent, dispassionate, and reliable in preventing extra-legal “perils” from determining or influencing in-state and out-of-state litigants’ likelihood of prevailing or “winning” in those respective tribunals.

Some jurists, corporate officials, and liability insurers insist that extra-legal perils are rampant in state courts.<sup>81</sup> Consequently, defendants in those cases assert that state court judges are significantly more likely to allow non-legal factors to adversely affect out-of-state litigants’ chances of winning.<sup>82</sup> There is, of course, the counter argument: extra-legal perils are found in both federal and state courts, and neither state nor federal judges are more or less likely to allow unwarranted perils to determine in-state and out-of-state litigants’ chances of winning. In addition, controversy also surrounds another issue: whether state and federal courts are more or less likely to permit real and arguably imaginary perils or factors to determine the disposition of class actions in state and federal courts. Therefore, the following sections review and discuss both real and imaginary perils of litigating civil actions generally and class actions particularly.

*A. In-State and Out-of-State Litigants’ Actual and Imaginary Risks of Litigating Civil Actions in State and Federal Courts*

*1. Proven and Perceived Perils in State Court Proceedings*

Early on, jurists, legislators and commentators voiced legitimate concerns about the proven risks of litigating civil actions in state courts and about reducing state court judges’ alleged propensity to allow extralegal variables to influence the disposition of disputes.<sup>83</sup> For example, during

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<sup>80</sup> It is fairly easy to identify an “in-state” litigant when: (1) that person resides in or is incorporated with a certain state, and (2) that person is either the plaintiff or defendant in the state court proceeding. On the other hand, when a diversity action commences in a federal district court, distinguishing “in-state” from “out-of-state” litigants becomes a bit more difficult. In this Article, a person is an “in-state” litigant if: (1) that person either resides or has a principle place of business in the state, and (2) that person invokes federal jurisdiction in a federal district court within his state, or (3) that person is named as defendant in a diversity action in the federal district court.

<sup>81</sup> See, e.g., U.S. CHAMBER OF COMMERCE & U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *supra* note 15, at 3.

<sup>82</sup> See, e.g., *id.* at 6.

<sup>83</sup> 3 DEBATES ON THE FEDERAL CONSTITUTION 533 (Jonathan Elliot ed., 1836).

debates in the First Congress, James Madison—a strong proponent of federal diversity jurisdiction—encouraged legislators to remember what was common knowledge at the time: the administration of justice in some state courts was unquestionably “tardy and even defective.”<sup>84</sup> Moreover, state court judges were often unqualified<sup>85</sup> and they served short terms.<sup>86</sup> As a consequence, the quality of justice in state courts was less than ideal.<sup>87</sup>

Also, early on, state legislatures often dominated state courts.<sup>88</sup> Therefore, some state legislatures’ intentional interference undermined the administration of justice in those tribunals.<sup>89</sup> For instance, after state courts’ findings, rulings or judgments, state legislatures often intervened and “fines [were] remitted, judicially established claims disallowed, verdicts of juries set aside, the property of one given to another, defective titles secured, marriages dissolved, [and] particular persons held in execution of debt released ....”<sup>90</sup>

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<sup>84</sup> See *id.*

<sup>85</sup> See, e.g., *Nicholson v. Sligh*, 1 H. & McH. 434, 437 (1772) (“It appears, from the notes of *T. Jennings*, Esq. who was counsel in this cause, and of *W. Cooke*, Esq. that the Justices [who were present could not] determine the points [of laws, and secured] ... the opinions of some of the gentlemen of the bar, [who were] not engaged in the cause ....”).

<sup>86</sup> See, e.g., PAUL SAMUEL REINSCH, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* 27–28 (1899) (reporting that “judges had a term of one year only.... Under this regime, the administration of the rules of the common law would of course be impossible.... [I]t was only in 1754 that a lawyer ... became chief justice. Samuel Livermore, chief justice in 1782, though trained in the law, refused to be bound by precedents, holding ‘that every tub should stand on its own bottom;’ and looking upon the adjudications of English tribunals only as illustrations.” (citation omitted)).

<sup>87</sup> Cf. *Hinchman v. Clark*, 1 N.J.L. 340 (1795) (“Where the law is in any degree ambiguous, and will admit of two constructions, one consonant to justice and humanity, the other contrary to these principles, it never should be done. Judges in the worst of times have been ashamed to do what we are called upon to do, unless where the construction was forced upon them, and was unavoidable. Let us not, in this government professedly founded upon the rights of human nature, begin our administration of justice with the doctrines and maxims which sometimes dishonored the character of the nation from which we and our institutions have alike sprung.”).

<sup>88</sup> See, e.g., Thomas Jefferson, *Notes on the State of Virginia, Query 13*, 120–21 (1784), reprinted in 1 *THE FOUNDERS’ CONSTITUTION* 319–20 (Philip B. Kurland & Ralph Lerner eds., 1987) (documenting Jefferson’s harsh criticism of the post-revolutionary Virginia courts for their lack of independence and for allowing the Virginia Legislature to dominate and influence judicial proceedings and rulings.).

<sup>89</sup> See *id.* at 320.

<sup>90</sup> See Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 519–20 (1925).

On the other hand, fear of imaginary perils in state courts generates the most debate and unfounded concerns about the plight of out-of-state litigants in those courts.<sup>91</sup> What are the imaginary risks of litigation in state courts? Historically, the belief that state courts are prejudiced, hostile, or biased against out-of-state citizens has been a prominent fear.<sup>92</sup> Of course, the precise origin of this particular imaginary or supposed risk is unknown.<sup>93</sup> However, during debates in the First Congress, James Madison stated:

[Regarding] disputes between citizens of different states ... it is [not] a matter of much importance. Perhaps [those disputes] might be left to the state courts.... [A] strong prejudice may arise, in some states, against the citizens of others, who may have claims against them.... A citizen of another state might not ... get justice in a state court, and ... he might think [he is] injured.<sup>94</sup>

Very likely, Madison’s comments started and continue to fuel the fear about state courts’ imaginary prejudices against out-of-state litigants.<sup>95</sup> Also, to justify the removal of diversity cases to federal courts, advocates who championed the rights of “foreign” litigants highlighted some supposed “inadequacies” that infected state court proceedings and cited non-citizens’ allegedly increased “possibility” of facing “difficult” proceedings in state court.<sup>96</sup>

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<sup>91</sup> See Justin D. Forlenza, *CAFA and Erie: Unconstitutional Consequences?*, 75 *FORDHAM L. REV.* 1065, 1070–71 (2006).

<sup>92</sup> See *id.* at 1071.

<sup>93</sup> See 13E CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3601 (3d ed. 2009) (“It is unclear what prompted the concern about the inadequacy of or bias in the state courts and whether it was justified.”).

<sup>94</sup> See 3 *DEBATES ON THE FEDERAL CONSTITUTION* 533 (Jonathan Elliot ed., 1836).

<sup>95</sup> See, e.g., *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) (“The object of the provisions [giving jurisdiction to] circuit courts ... of controversies between citizens of different States ... was to secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides.”); *Kopff v. World Research Grp., LLC*, 298 F. Supp. 2d 50, 55 (D.D.C. 2003) (embracing the belief that the Constitution and federal law created federal diversity jurisdiction to prevent state courts from actually discriminating against nonresident defendants); Donald R. Songer, Martha Humphries Ginn & Tammy A. Sarver, *Do Judges Follow the Law When There Is No Fear of Reversal?*, 24 *JUST. SYS. J.* 137, 139 (2003) (“The Federal Judiciary Act of 1789 created diversity jurisdiction to protect out-of-state citizens from the biases inherent in the various state courts.” (citing EDWIN CHERMERINSKY, *FEDERAL JURISDICTION* (Boston: Little, Brown and Co., 1989))).

<sup>96</sup> See WRIGHT, *supra* note 93; see also *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 87 (1809) (Marshall, C.J.) (“[Accepting as true] that the tribunals of the states will adminis-

But, it should be stressed that citing out-of-state litigants' fear of "potential local bias"<sup>97</sup> in state courts as the primary justification for removing state substantive law disputes to federal courts has been challenged.<sup>98</sup> For example, one commentator has suggested that, historically and presently, state courts' alleged bias or propensity to discriminate is not necessarily the cause of non-citizens' unfounded fears litigating in state courts.<sup>99</sup> Instead, out-of-state litigants want to evade local substantive laws and state courts' evenhanded application of those laws to citizens and non-citizens.<sup>100</sup> Arguably, this latter explanation has some appeal, even though one cannot pinpoint the exact origin of out-of-state corporations' and citizens' unproven fears or imaginations about state courts judges' purported inability to be impartial and judicious.

## 2. *Proven and Imaginary Perils in Federal Diversity Proceedings*

Again, the Constitution and an act of Congress created federal diversity jurisdiction ostensibly to increase the likelihood of in-state and out-of-state litigants' receiving equal treatment in federal courts.<sup>101</sup> But jurists have questioned and even criticized that justification, asserting that diversity jurisdiction only enhances the disorderly administration of justice in the United States.<sup>102</sup> Do plaintiffs have unfounded concerns about the risk of litigating state law claims in federal courts? A reasonable review of the literature reveals that neither in-state nor out-of-state litigants should have

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ter justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution ... either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.").

<sup>97</sup> See *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring).

<sup>98</sup> See John Burritt McArthur, *Good Intentions Gone Bad: The Special No-Deference Erie Rule for Louisiana State Court Decisions*, 66 LA. L. REV. 313, 317–18 (2006).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Forlenza, *supra* note 91, at 1070–71.

<sup>102</sup> See, e.g., *Elbert*, 348 U.S. at 53–54 (Frankfurter, J., concurring) ("[O]ur holding [is] such a glaring perversion of the [original] purpose [for granting] diversity jurisdiction ... that it ought not to go without comment, as further proof of the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction."); ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 37 (Harv. Univ. Press, 1955) (Justice Jackson wrote: "[I]n my judgment the greatest contribution that Congress could make to the orderly administration of justice ... would be to abolish the jurisdiction of the federal courts which is based solely on the ground that the litigants are citizens of different states.").

such unfounded fears.<sup>103</sup> On the other hand, for those who commence diversity actions in federal courts, the actual risks are substantial and most litigants are cognizant of the perils.<sup>104</sup> For example, both in-state and out-of-state litigants understand and appreciate that legal expenses and other unexpected costs can be burdensome and even staggering if litigants want to enter and remain in federal court until finality.<sup>105</sup> In addition, the federal docket is overburdened with diversity cases, and those controversies present numerous questions of law, which many federal judges are precluded from addressing intelligibly and in a timely manner because financial resources are inadequate.<sup>106</sup>

But even more significantly, proven judicial bias is an outstanding and unwarranted peril that in-state plaintiffs and defendants must confront in federal courts.<sup>107</sup> First, unlike the imaginary biases and hostilities that allegedly exist in state courts,<sup>108</sup> empirical research shows consistently that federal judges often permit their preferences and attitudes about laws and procedures to influence the disposition of cases.<sup>109</sup> More telling, federal

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<sup>103</sup> ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 288 (3d ed. 1999).

<sup>104</sup> See *id.* (explaining cost); E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 202 (2005) (claiming federal courts can misinterpret state law).

<sup>105</sup> See, e.g., CHERMERINSKY, *supra* note 103, at 288–89 (asserting that the initial justification for federal diversity jurisdiction has vanished and that diversity actions are too costly); Percy, *supra* note 104, at 201 (“Given the lack of firm evidence that local prejudice actually exists in state courts ... and in light of the serious cost of diversity jurisdiction .... diversity jurisdiction raises serious federalism concerns.”).

<sup>106</sup> See, e.g., David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 322–24 (1977) (reporting and reviewing statistics which confirmed that diversity actions and questions are overburdening federal courts and undermining the quality of justice because financial resources are expensive and limited).

<sup>107</sup> See generally Songer, *supra* note 95 at 138.

<sup>108</sup> See, e.g., Stone Grissom, *Diversity Jurisdiction: An Open Dialogue in Dual Sovereignty*, 24 HAMLINE L. REV. 372, 385 (2001) (“Opponents of diversity jurisdiction argue that there no longer exists enough bias against out of state residents to justify ... [the] costly and burdensome doctrine.... [S]ince the decision in *Erie*, the federal courts have applied state laws consistently in diversity cases. Thus, commercial interests may no longer use the federal forum to find protection against biased state legislatures.”); James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1942 (2004) (questioning whether state judges are biased in favor of citizens and noting that state court bias could become a problem that might affect the adjudication of disputes between in-state and out-of-state litigants).

<sup>109</sup> See Songer, *supra* note 95 at 138 (listing numerous studies of judicial bias in federal courts and reporting the empirical findings).

judges have admitted that their prejudices and attitudes affect the outcome of diversity jurisdiction cases more wittingly than unwittingly.<sup>110</sup>

Thus, it is warranted to ask: who is more likely to benefit from federal judges' bias in diversity jurisdiction cases, in which the disputes involve state law claims? The answer is not too complicated: out-of-state litigants—national corporations and their insurers—have a higher probability of receiving favorable procedural and substantive outcomes in federal courts than in-state litigants.<sup>111</sup> More specifically, one reputable study revealed that out-of-state corporations have a greater likelihood of prevailing in those tribunals than in-state corporations.<sup>112</sup> Similarly, nonlocal individuals' probability of prevailing in diversity actions is statistically and significantly greater than in-state individuals.<sup>113</sup> Therefore, in light of documented judicial bias in federal courts, another question is warranted: why move the bulk of states' substantive law class action from state to federal courts when the risk of judicial bias is significantly more prevalent in the latter courts? Consider the discussion in the next section.

## *B. Proven and Unproven Risks of Litigating Class Actions in Federal and State Courts*

### *1. A Brief History of Class Action*

For centuries, English law has been very clear: if a plaintiff or a defendant has a material interest in a legal controversy, a complaint must list or identify that person as a "named party."<sup>114</sup> The rule was fashioned to ensure that a court's judgment would bind all interested parties and was called a "joinder," since all interested parties had to be joined in the case.<sup>115</sup>

<sup>110</sup> *Id.* (reporting that the "admissions of a number of sitting federal judges" reinforce the findings of judicial bias in federal courts).

<sup>111</sup> See Kevin M. Clermont & Theodore Eisenberg, *Commentary, Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1142 (1996) ("Instead of faring poorly, nonlocals ... enjoy an elevated win rate.").

<sup>112</sup> *Id.* ("An out-of-state corporation suing a corporation either incorporated or having its principal place of business in the forum state has a win rate of 84.47%, whereas an in-state corporation suing an out-of-state corporation has only a 66.66% win rate.").

<sup>113</sup> *Id.* ("[O]ut-of-state individual plaintiffs suing in-state individual defendants have a win rate of 67.78%, whereas in-state individuals suing out-of-state individuals have a win rate of only 57.06%.").

<sup>114</sup> See 1 HERBERT B. NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 1.09, 1–22 (3d ed. 1992).

<sup>115</sup> See *id.* ("[English] equity courts imposed a compulsory joinder rule that all parties materially interested—either legally or beneficially—in the subject of the suit had to be



But frequently, a joinder was extremely impractical and onerous for several reasons. Litigants often did not file meritorious cases because the pool of interested parties was too large; consequently, the representative had difficulty identifying and locating all parties.<sup>116</sup> In addition, assuming all interested persons were located, they were difficult to manage because the class comprised such large numbers.<sup>117</sup> Furthermore, misjoinder, or the practice of including persons who should have been excluded from the pool of interested parties, often occurred.<sup>118</sup> Without a doubt, both individually and collectively, mandatory joinder and misjoinder were real risks for litigants in England and as a consequence, they were major procedural headaches, forcing litigants to invest excessive time and generating unexpected financial costs.<sup>119</sup>

While English courts of law and equity courts embraced the compulsory joinder rule, England’s Court of Chancery decided to adopt a less burdensome and a more liberal method to join interested parties.<sup>120</sup> Chancery

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made parties so there might be a complete decree to bind all.” (citing 1 REPORT ON CLASS ACTIONS, ONTARIO LAW REFORM COMMISSION 5 (1982))).

<sup>116</sup> Cf. *Joll v. Curzon*, (1847) 136 Eng. Rep. 501, 503 (stressing that under the rules of joinder, “[t]he defendant is bound to state the names of all ... persons with whom the contract was made.... [T]he affidavit must give the names and residences of the several parties with convenient certainty ....” The court then concluded that defendant’s plea revealed “that some of the parties [could not] be brought into court at all” because of inconvenience).

<sup>117</sup> See *Thimblethorp v. Hardesty*, (1702) 87 Eng. Rep. 1133 (K.B.) 1133 (finding that there were too many parties, but concluding that the action should have commenced “in the joint names of *the principal and the ancients*.... [T]he debt upon the account stated [involves] ... many particular persons, and they all ought to join in the action ....”).

<sup>118</sup> See *Pearce v. Watkins*, (1852) 64 Eng. Rep. 1132 (Ch.) 1133–34 (“[I]t is a rule of this [c]ourt that a [p]laintiff cannot join himself with another person who has no interest. The rule of this [c]ourt as to misjoinder, that is to say, the joinder of parties who have conflicting interests, is a very strict rule.”).

<sup>119</sup> Cf. *M’Intyre v. Miller*, (1845) 153 Eng. Rep. 304, 308 n. (a) (“Pearson obtained a rule to [explain] why the peremptory undertaking should not be enlarged and why the defendant should not join in demurrer, ... [why] the plaintiff [should not have] liberty to sign [a] judgment for want of such joinder, and why the defendant should not pay the costs of the application. Bovill [explained] ... that there was no power to compel a party to join in demurrer, and no power in the [c]ourt to award costs, which could only be given when the parties put themselves upon the judgment of the Court, and judgment was actually given; ... [but in this case, there was] no judgment ... and no costs [were] awarded.” (citing *Cooper v. Painter*, 153 Eng. Rep. 308, 308)).

<sup>120</sup> William Weiner & Delphine Szyndrowski, *The Class Action, from the English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread?*, 8 WHITTIER L. REV. 935, 936–38 (1987).

allowed litigants to file a bill of peace.<sup>121</sup> Designed “to prevent a multiplicity of suits,” the bill of peace covered all interested parties and subjected every litigant to the same rulings, outcomes, judgments, or damages.<sup>122</sup>

There were two types of bills—pre- and post-trial bills of peace.<sup>123</sup> Before commencing a lawsuit, a representative of a group could file a pre-trial bill of peace and ask the court to join all interested persons if there were simply too many persons to locate in a timely manner or to identify precisely.<sup>124</sup> However, once one’s cause of action had been tried in a court of law and the court had entered its judgment, the successful party could file a post-trial bill of peace.<sup>125</sup> A court would grant the latter “to prevent further and useless litigation.”<sup>126</sup>

Of course, a representative could commence or defend against an action on behalf of other interested persons and himself.<sup>127</sup> But the bill of peace petitioner had to prove three elements.<sup>128</sup> He had to establish that: (1) multiple lawsuits had been filed repeatedly against the representative, (2) several persons had threatened to bring separate suits against the individual, and (3) multiple lawsuits had been filed in the same court.<sup>129</sup> In addition, the representative had to establish that all group members had a material interest in the issues and the lawsuits.<sup>130</sup> If the petitioner satisfied

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<sup>121</sup> See *How v. Tenants of Bromsgrove*, (1681) 23 Eng. Rep. 277, 277 (Two substantive questions appear in this case: (1) whether the Lord of Bromsgrove Manor “had a grant of *free warren*”; and if so, (2) “whether there were sufficient common left for the tenants.” The Lord Chancellor declared that, “these matters were properly triable at common law; and he did not see, what jurisdiction the chancery had of this cause.” But plaintiffs argued: “[T]he bill was ... a bill of peace.” The court declared that bills of peace are proper in equity.).

<sup>122</sup> *Disney v. Robertson*, (1719) 145 Eng. Rep. 588, 588 (“[A] bill of peace ... binds all parties ... [and is] retained to prevent a multiplicity of suits.”).

<sup>123</sup> See *Corp. of London v. Attorney-Gen.*, (1848) 9 Eng. Rep. 829, 838.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See generally *Lord Stawell v. Atkins*, (1795) 145 Eng. Rep. 967.

<sup>128</sup> *Id.* at 968.

<sup>129</sup> See *id.* (“[A] suit is in the nature of a bill of peace, which can be brought only [under three conditions]: 1st, Where [a] party is harassed by repeated suits. 2dly, Where several persons claiming under a general right threaten to bring separate suits, as in parochial or manerial rights dispute(s). 3dly, Where a bill for tithes has been instituted in the same court.”).

<sup>130</sup> See *Gage v. Lister*, (1705) 22 Eng. Rep. 147, 147 (“[Where several persons have one and the same rights and each person wants to secure remedies for their disturbed several rights, the persons may apply for a bill of peace]...to prevent [e]xpence, and [a]

those elements, the court granted a bill of peace.<sup>131</sup> Again, that judgment applied to all interested members in the group.<sup>132</sup>

In the United States, the class action evolved out of England’s bill of peace. In the mid-1800s several states adopted the practice of allowing a representative to file a lawsuit on behalf of numerous interested persons,<sup>133</sup> and the states codified that principle in their respective Field Codes.<sup>134</sup> The first class action rule per se was Rule 38 of the Federal Equity Rules.<sup>135</sup> It was adopted in 1913 and was the predecessor to the current Federal Rule 23(a), which states:

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[m]ultiplicity of [s]uits [the court] ... will establish the [r]ight of all [p]arties concerned ....” (emphasis omitted).

<sup>131</sup> See *Atkins*, 145 Eng. Rep. at 968.

<sup>132</sup> See *Gage*, 22 Eng. Rep. at 147.

<sup>133</sup> See 3 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS, § 13.04, 13–14 n.24 (3d ed. 1992) (The Field Code of 1849 states in part: “[When a question concerns] a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.”).

<sup>134</sup> See *Haxton v. Haxton*, 705 P.2d 721, 726 (Or. 1985) (“[Field Codes were simply] a comprehensive codification of [states’] laws .... [The] codes were the product of a commission directed by David Dudley Field between ... 1846 and 1865 .... [The commission was] formed to codify the law of New York. The codes are a restatement and reformation of then existing statutory and common law.... [The Field Codes were successful and] they served as a model for many codification attempts elsewhere in the country, including one of the first Oregon codes in 1853. The Field Codes were organized into five separate codes: Code of Civil Procedure, Code of Criminal Procedure, Political Code, Penal Code and Civil Code.”).

<sup>135</sup> Federal Equity Rule 38 (1912) provided: “When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.” JAMES LOVE HOPKINS, FEDERAL EQUITY RULES (8th ed. 1933); see also *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 950 (E.D. Tex. 2000) (“The English equity rule permitting exceptions to compulsory joinder was adopted in United States jurisprudence and was codified in the Federal Equity Rule 48 (1842), the New York Field Code of 1848, as amended in 1849, and Federal Equity Rule 38 (1912, the successor to earlier Equity Rule 48 (1842)). The United States Supreme Court officially abandoned old Equity Rule 48 in 1912 and adopted Equity Rule 38. Federal Equity Rule 38 ‘allowed representative suits where the parties were too numerous for joinder. In contrast with the prior rule [Federal Equity Rule 48], absent parties could be bound by subsequent judgments pursuant to this provision.’” (citations omitted)).

One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>136</sup>

Originally, Rule 23 prohibited *any* class action decisions or judgments from binding absent class members, if a representative had not secured those persons' express consent and the class action sought various damages.<sup>137</sup> Of course, the reason for securing members' consent is not difficult to comprehend, as it evolved from a fundamental legal principle: an in personam<sup>138</sup> judgment does not bind a person, if that person has not received service of process and is not party in a legal action.<sup>139</sup> However, in 1966, an amendment expanded the reach of class actions under Federal Rule 23.<sup>140</sup>

Most remarkably, under a new Rule 23(b)(3),<sup>141</sup> a "common-question damages" judgment in a class action could bind absent class members

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<sup>136</sup> FED. R. CIV. P. 23(a).

<sup>137</sup> See 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.03 (3d ed. 1997) (reporting that original rule limited the binding effect of a damages ruling to class members who affirmatively embraced an "opt-in" requirement or who directly participated in the class action).

<sup>138</sup> See *Brooks v. United States*, 833 F.2d 1136, 1143 (4th Cir. 1987) ("A proceeding in personam is a proceeding to enforce personal rights and obligations brought against the person and based on jurisdiction of the person, although it may involve his right to, or the exercise of ownership of, specific property, or seek to compel him to control or dispose of it in accordance with the mandate of the court." (citing 1 AM. JUR. 2D, ACTIONS, § 39, at 573 (1962))).

<sup>139</sup> See *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877))).

<sup>140</sup> See *Notes of Rules Advisory Committee on 1966 Amendments to Rule 23*, 39 F.R.D. 69, 104-05 (1966).

<sup>141</sup> Federal Rule of Civil Procedure 23(b)(3) states, in relevant part:

even without those persons’ affirmative consent.<sup>142</sup> To ensure that Rule 23(b)(3) did not violate absent members’ due-process rights, the Rules Advisory Committee added some procedural safeguards.<sup>143</sup> Under a newly fashioned Rule 23(c)(2)(B),<sup>144</sup> the committee inserted two important clauses: (1) a mandatory notice clause that requires class action representatives to give sufficient and timely notices to absent members, and (2) an opt-out provision that gives absent class members an opportunity to exclude themselves from classes certified under Rule 23(b)(3).<sup>145</sup>

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A class action may be maintained if Rule 23 (a) is satisfied and if: ... (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23(b)(3).

<sup>142</sup> See *Notes of Rules Advisory Committee on 1966 Amendments to Rule 23*, 39 F.R.D. at 105; see also *Hansberry*, 311 U.S. at 41 (1940) (The court recognized and embraced the exception to the general rule, “that, to an extent not precisely defined by judicial opinion, the judgment in a ‘class’ or ‘representative’ suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.”).

<sup>143</sup> Lawrence J. Restieri, Jr., *The Class Action Dilemma: The Certification of Classes Seeking Equitable Relief and Monetary Damages After Ticor Title Insurance Co. v. Brown*, 63 FORDHAM L. REV. 1745, 1760 (1995).

<sup>144</sup> Federal Rule of Civil Procedure 23(c)(2)(B) states, in relevant part:

For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: ... (v) that the court will exclude from the class any member who requests exclusion;(vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on [class] members under Rule 23(c)(3).

FED. R. CIV. P. 23(c)(2)(B).

<sup>145</sup> See *Notes of Rules Advisory Committee on 1966 Amendments to Rule 23*, 39 F.R.D. at 107 (1966) (A review of the Committee’s Notes reveals that the mandatory notice and opt-out provisions were necessary “to fulfill requirements of due process to which the class action procedure is of course subject.” (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315–17 (1950); *Hansberry v. Lee*, 311 U.S. 32, 41 (1940))).

Although constitutional scholars raised their misgivings about the legality of those two controversial provisions,<sup>146</sup> the Supreme Court upheld the constitutionality of Rule 23(b)(3) damages classes.<sup>147</sup> As of this writing, the Field Codes and the original and amended Federal Rule 23 comprise the summation of present-day class action rules.<sup>148</sup> Also, barring Mississippi, every state has embraced some class action procedure.<sup>149</sup> Like England's bill of peace, federal and state class action rules and procedures are designed to reduce multiple lawsuits, spread litigation costs, enhance judicial efficiency, ensure that similarly situated persons secure access to courts, ensure that all class members receive damages, and reduce the costs of litigation.<sup>150</sup>

<sup>146</sup> See, e.g., Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1967) (concluding that the sweep of Rule 23(b)(3) is "among the more debatable of the innovations in the amended Rule," and comparing the opt-out procedure to the Book-of-the-Month Club); Marvin E. Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 ANTITRUST L.J. 295, 300 (1966) (indicating his preference for an affirmative opt-in procedure, so that silence would not constitute consent to inclusion); Charles A. Wright, *Proposed Changes in Federal Civil, Criminal and Appellate Procedure*, 35 F.R.D. 317, 338 (1964) ("In the situation which [Rule 23](b)(3) covers, there is a strong feeling that the person who wants to go it alone, and to bring his individual action with his own lawyer, should be permitted to do so.... Even with this protection [of the right to opt-out], [Rule 23](b)(3) is a novel and controversial proposal ....").

<sup>147</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810–12 & n.3 (1985) (concluding that Rule 23(b)(3)'s notice and opt-out requirements are indispensable requirements of due process rather than merely procedural niceties).

<sup>148</sup> See H.R. REP. NO. 108-44, at 9 (2003).

<sup>149</sup> See *USF&G Ins. Co. of Miss. v. Walls*, 911 So. 2d 463, 468 (Miss. 2005) (stressing that the Mississippi Supreme Court "has the exclusive power to make rules of practice, procedure, and .... [that] class actions[ rules] are not a part of Mississippi practice—chancery, circuit, or otherwise."); LINDA S. MULLENIX, *STATE CLASS ACTIONS: PRACTICE AND PROCEDURE* (Matthew G. Ball & Todd L. Nunn eds., CCH 2000 with annual updates); Richard T. Phillips, *Class Actions & Joinder in Mississippi*, 71 MISS. L.J. 447, 453 n.14 (2001) (suggesting that New Hampshire and Virginia do not have class action rules, but recognize "equitable class actions' ... in consumer litigation"). But see N.H. REV. STAT. ANN. § 27-A (2011) (covering "class actions"); *Prive v. N. H.-Vt. Health Servs.* No. 98-E-20, 1998 WL 375294, at \*1 (N.H. Super. Ct. July 1, 1998) (observing that Rule 27-A, and FED. R. CIV. P. 23's provisions are comparable); *Kuznicki v. Mason*, 639 S.E.2d 308, 311 (Va. 2007) (reaffirming that Virginia's Code § 55-79.53 allows a class action and relief if condominiums, time-sharing units, or property-association matters produce the legal disputes); *King v. Va. Birth-Related Neurological Injury Comp. Program*, No. HA-726-4, 1990 WL 751353, at \*3 (Va. Cir. Ct. Nov. 9, 1990) (reaffirming that class actions are not generally allowed in Virginia and allowing the twenty-nine individual physicians to sue defendant only on behalf of themselves individually).

<sup>150</sup> See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of



There is one final observation. Federal and state court class action practices, procedures, and resolutions are not remarkably different.<sup>151</sup> But a variety of persons—insurers, insured corporate officers and directors, laypersons, and even commentators who are not practitioners—have presented several arguably outlandish misconceptions about the risks that class action litigants confront or are likely to confront in state and federal courts.<sup>152</sup> Consequently, in light of those misconceptions, gross imaginations have evolved. In fact, an extremely wide gulf has evolved between what corporate defendants believe and the actual risks of litigating class actions in state and federal courts.

## 2. Proven Class Action Perils in Federal Courts

All federal lawsuits have unavoidably inherent risks, which can decrease plaintiffs or defendants’ likelihoods of winning procedurally or on the merits. And whether plaintiffs and defendants are in-state or out-of-state litigants, their respective legal counsels should understand, appreciate, and prepare for those known risks. Similarly, defense counsels as well as the counsels for the class understand that the class representative must overcome several known procedural obstacles.

For example, under federal law, a class representative must prove that she has standing to commence a class action.<sup>153</sup> This means that the “litigant must normally assert [and prove] his own legal interests rather than those of third parties.”<sup>154</sup> Furthermore, the class representative must establish that a causal connection exists between her alleged injury and the

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small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”); *In re American Reserve*, 840 F.2d 487, 489 (7th Cir. 1988) (observing that a class action is a method to enforce rights or deter the abridgment of rights which might not otherwise exist for individuals with small claims).

<sup>151</sup> See THOMAS E. WILLGING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEYS’ CHOICE OF FORUM IN CLASS ACTION LITIGATION 54 (Federal Judicial Center, 2005) (After examining state and federal courts’ class certification rulings, motions, and other issues, the authors discovered that class action rulings and the disposition of cases did not differ greatly between state and federal courts.).

<sup>152</sup> See *infra* notes 244, 249–54, 386–90 and accompanying text.

<sup>153</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (“[F]ederal standing requires an allegation of a present or immediate injury in fact, where the party requesting standing has ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.’” (citing *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952); *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

<sup>154</sup> *Shutts*, 472 U.S. at 804.

defendant's conduct, and that a favorable court ruling will undo or correct the harm.<sup>155</sup> Without doubt, whether a class representative can overcome those barriers or perils is far from certain.

Second, a class representative must secure a class certification before proceeding to a trial on the merits.<sup>156</sup> And, as stated earlier, Rule 23(a) outlines multiple elements that a class representative must satisfy before a court will grant a motion for class certification.<sup>157</sup> Again, the class representative must prove that: (1) joining all similarly situated parties is impracticable because the number is extremely large—numerosity, (2) class members present common questions of law or fact—commonality, (3) class members present similar claims or causes—typicality, and (4) the representative “will fairly and adequately protect the interests of the class”—adequate representation.<sup>158</sup>

In addition, a class representative must overcome another barrier. She must persuade the court that a class action will not present manageability problems.<sup>159</sup> Stated another way, the representative must establish that choice of law problems,<sup>160</sup> the likelihood of timely and costly *Erie* guesses,<sup>161</sup> and insufficient means to notify numerous class members<sup>162</sup> will not

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<sup>155</sup> *Id.* (citing *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)); *see also Doe I v. Unocal Corp.*, 67 F.Supp.2d 1140, 1141, 1147 (C.D. Cal. 1999) (denying a putative class of Burmese citizens' motion for class certification under Rule 23(b)(2) in an ATS case. The court concluded that the plaintiffs—who alleged that Unocal had subjected them to forced labor, forced relocation, and various forms of cruel, inhuman, and degrading treatment in connection with the pipeline construction project—did not have standing to seek injunctive relief. The court declared that an injunction against the corporation probably would not redress their alleged injuries since “the cessation of [the] alleged illegal acts would depend on the independent actions of companies and governmental entities who [were] not parties to [the] lawsuit.”).

<sup>156</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

<sup>157</sup> FED. R. CIV. P. 23(a).

<sup>158</sup> *See Windsor*, 521 U.S. at 613.

<sup>159</sup> *Schwartz v. Upper Deck Co.*, 183 F.R.D. 627, 679 (S.D. Cal. 1999).

<sup>160</sup> *See In re Paxil Litig.*, 212 F.R.D. 539, 551 (C.D. Cal. 2003) (refusing to certify a class because the risk of confusing the jury—“when taken together with the risk of improperly grouping different states' laws”—would outweigh “any possible advantages to be gained from certification.”).

<sup>161</sup> *See Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992) (“[I]t is the duty of the federal court to determine as best it can, what the highest court of the state would decide.” (citing *Comm'r of Internal Revenue v. Estate of Bosch*, 387 U.S. 456 (1967); *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223 (1940); *Commonwealth Life Ins. Co. v. Neal*, 521 F. Supp. 812 (M.D. La.), *aff'd*, 669 F.2d 300 (5th Cir. 1981))); *see also New Orleans Assets, LLC v. Woodward*, 363 F.3d 372, 376, 377 n.10 (5th Cir. 2004) (acknowledging that the Louisiana Supreme Court had not addressed the disputed

undermine the representative’s ability to manage the class action competently.<sup>163</sup> Essentially, the class representative must convince the federal district court that a class action is superior to other methods of adjudication.<sup>164</sup>

Without doubt, a federal district judge’s requiring a representative to meet these minimum requirements before certifying a class presents daunting and very real challenges. However, for emphasis, the obvious must be stated: numerosity, commonality, typicality, and adequate representations are perils that complaining parties must overcome.<sup>165</sup> And more often than not, class action complainants are not medium-to-large corporations, employers, insurers, or national and international corporate officials. Instead, consumers of various products and services are significantly more likely to be complainants in class actions.<sup>166</sup> But even more importantly, federal courts are appreciably more likely to deny than grant those consumers’ motions for class certification.<sup>167</sup>

Of course, class members also face other established as well as unexpected risks, which can reduce complainants’ likelihood of prevailing in federal court. Consider, for example, the plight of the class representative

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question in this case, the Fifth Circuit refused to certify the case to the Supreme Court of Louisiana, preferring instead “[to] make an *Erie* guess.”).

<sup>162</sup> See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 747 (5th Cir. 1996) (“We first address the district court’s superiority analysis. The court acknowledged the extensive manageability problems with this class. Such problems include [the difficulty of giving] ... notice to millions of class members ...”).

<sup>163</sup> See *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 209–10 (concluding that, in light of various theories or recovery under various state laws, the plaintiffs failed to demonstrate that a class action would be manageable. “Where plaintiffs ... failed to [present] clearly defined classes [to the court given] on the variations in state law, the superiority requirement has not been met.” (citing *In re Teletronics Pacing Systems, Inc.*, 168 F.R.D. 203, 219 (S.D. Ohio 1996))).

<sup>164</sup> See *id.* at 204.

<sup>165</sup> FED. R. CIV. P. 23(a).

<sup>166</sup> See generally *infra* Table 3 and accompanying discussion in Part VI.

<sup>167</sup> See, e.g., Nicholas M. Pace, Stephen J. Carroll, Ingo Vogelsang & Laura Zakaras, *Insurance Class Actions in the United States*, 2007 INST. FOR CIV. JUST. 21–22, available at [http://www.rand.org/pubs/monographs/2007/RAND\\_MG587-1.sum.pdf](http://www.rand.org/pubs/monographs/2007/RAND_MG587-1.sum.pdf) (reporting the results of 564 “attempted class actions” against insurers and finding that “[o]nly 14 percent of the cases in [the] data set [became] certified classes. The judges denied certification in 11 percent of the cases, and the remainder—about 75 percent of the total—never had a decision either way.... For all attempted class actions .... [t]he judge ruled in favor of the defendant on some sort of dispositive pretrial motion in 37 percent of the cases.”).

in *Latona v. Carson Pirie Scott & Co.*<sup>168</sup> Pietra Latona commenced a class action against Carson Pirie Scott & Company, citing numerous violations under various federal and state truth-in-lending and consumers' protection statutes.<sup>169</sup> After identifying herself and another disgruntled consumer—Priscilla Staniec—as the class representatives, Latona filed a motion for class certification.<sup>170</sup>

The federal district court denied the class certification motion, citing three unexpected risks that would have prevented the class from receiving fair and adequate representation.<sup>171</sup> First, the court found that the proposed class's attorney was married to Latona's niece.<sup>172</sup> Therefore, in light of the alleged nepotism and related concerns that the Seventh Circuit has highlighted,<sup>173</sup> the federal district judge concluded that Latona could not represent the class's interests competently and fairly.<sup>174</sup> Additionally, the court noted that the second class representative—Staniec—was both psychologically and physically impaired.<sup>175</sup> More specifically, during a two-year period, "she was nonfunctional and confined to bed rest."<sup>176</sup> Therefore, citing those personal problems and embracing the Sixth Circuit's concerns about class representatives' unsuitability generally and their medical problems in particular,<sup>177</sup> the *Latona* federal district court concluded that Staniec could not adequately represent the class members' interests.<sup>178</sup>

Certainly, one's attempt to certify a class action for trial presents multiple difficulties for named plaintiffs or class representatives. But there is

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<sup>168</sup> *Latona v. Carson Pirie Scott & Co.*, No. 96 C 2119, 1997 WL 109979, at \*1 (N.D. Ill. Mar. 7, 1997).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at \*2.

<sup>172</sup> *Id.* at \*1.

<sup>173</sup> See *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 91 (7th Cir. 1977) ("Since possible recovery of the class representative is far exceeded by potential attorneys' fees, courts fear that a class representative who is closely associated with the class attorney would allow settlement on terms less favorable to the interests of the absent class members.").

<sup>174</sup> *Latona*, 1997 WL 109979, at \*2.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* ("Ms. Staniec has a benign brain tumor and a spinal condition, but she also believed that some of her periods of incapacitation could have resulted from just emotional distress.").

<sup>177</sup> See *In re Am. Med. Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996) (concluding that plaintiff's suitability as a class representative was very questionable because of plaintiff's psychological problems); see also *In re Teletronics Pacing Systems, Inc.*, 168 F.R.D. 203 (S.D. Ohio 1996) (finding that plaintiff's health problems prevented plaintiff from representing the class).

<sup>178</sup> *Latona*, 1997 WL 109979, at \*2.

more: a motion to certify a settlement-only class action presents unique impediments<sup>179</sup> for class members who question the merits of a proposed settlement.<sup>180</sup> To illustrate, consider the plight of the disgruntled class members who challenged the class action settlements in *Mars Steel v. Continental Illinois National Bank & Trust*.<sup>181</sup>

The class representative—William J. Tunney—retained the law firm of Joyce and Kubasiak to file a class action against Continental Illinois National Bank and Trust Company (Continental).<sup>182</sup> The action proceeded on behalf of persons who had borrowed money from Continental using an interest rate that was congruent with the bank’s prime rate (*Tunney* action).<sup>183</sup> The complaint alleged that Continental committed fraud and breached various contracts over a ten-year period by failing to charge an interest rate that was pegged to the “prime rate.”<sup>184</sup> A state court judge certified the *Tunney* action as a nationwide class action.<sup>185</sup> Three years after filing the *Tunney* action, the class representative—along with the class’s legal counsels—offered to settle the action. Continental rejected the offer.<sup>186</sup>

However, two years after the state court certified the *Tunney* action, Mars Steel Corporation filed a class action against Continental in a federal court (*Mars* action).<sup>187</sup> Jerome Torshen—the class representative—filed the lawsuit on behalf of aggrieved consumers like those in the *Tunney* suit.<sup>188</sup> But unlike the multiple allegations in the earlier suit, the *Mars* complaint only alleged that Continental violated the federal Civil Racket-

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<sup>179</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619–20 (1997) (declaring that a class representative must also satisfy Federal Rule 23(a) and (b) after petitioning a district to certify a class action for settlement, but stressing that the court “need not inquire whether the case, if tried, would present intractable management problems.”) (citation omitted).

<sup>180</sup> *Id.* at 619.

<sup>181</sup> *Mars Steel Corp. v. Cont’l Ill. Nat’l Bank & Trust Co. of Chi.*, 834 F.2d 677 (7th Cir. 1987).

<sup>182</sup> *Id.* at 678.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 678–79.

<sup>185</sup> *Id.* at 679 (appointing “Joyce and Kubasiak to represent the class.”).

<sup>186</sup> *Id.* (Under Joyce and Kubasiak’s settlement offer, “Continental would ... not ... oppose a request for an attorney’s fee of ... \$1.25 million ... and the class members would [have] an opportunity to [secure] new loans from Continental at below-market rates. Continental refused the offer ....”).

<sup>187</sup> *Mars Steel*, 834 F.2d at 679.

<sup>188</sup> *Id.*

eer Influenced and Corrupt Organizations Act<sup>189</sup> during a ten-year interval.<sup>190</sup>

Although Rule 23 does not have a “tentative certification” provision,<sup>191</sup> the federal district judge preliminarily approved the *Mars* settlement—without holding an evidentiary hearing—and simultaneously “[certified] the suit as a class action for settlement purposes only.”<sup>192</sup> Shortly thereafter, Continental accepted Torshen’s offer and settled the *Mars* class action.<sup>193</sup> Two class members, however, criticized and refused to embrace the settlement.<sup>194</sup> They were William Tunney and another class member who decided to opt out of the *Mars* settlement in order to preserve the state court class action.<sup>195</sup>

Ultimately, the district court conducted a “fairness” hearing and approved the settlement after concluding that the agreement was fair.<sup>196</sup> Of course, under the doctrine of res judicata, the court’s conclusion effectively extinguished the claims of all class members who did not opt out of the settlement class action.<sup>197</sup> In his appeal before the Seventh Circuit, Tunney asserted that: (1) the judge erroneously certified a preliminary class action for settlement purposes before certifying a class action for trial in the *Mars* suit, (2) the settlement class action was fundamentally unfair because the class notice was inaccurate and misleading, and (3) class members who opposed the settlement did not have an opportunity to prove—either before or during the fairness hearing—that the class action settlement was unfair.<sup>198</sup>

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<sup>189</sup> *Id.*; see also 18 U.S.C. § 1961 (2006).

<sup>190</sup> *Mars Steel*, 834 F.2d at 679.

<sup>191</sup> See *In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 177 (5th Cir. 1979) (concluding that “Rule 23 does not deal specifically with a tentative settlement class”). But see Comment, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1557 n.111 (1976) (suggesting that Rule 23(c)(1) sanctions allow a tentative class action—“a form of conditional certification”). Federal Rule of Civil Procedure 23(c)(1) and note to Subdivision (c)(1) suggests that some forms of conditional certification may be appropriate. It reads in relevant part: “An order embodying a [class action] determination can be conditional ... [and] can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound.” FED. R. CIV. P. 23(c)(1).

<sup>192</sup> *Mars Steel*, 834 F.2d at 680.

<sup>193</sup> *Id.* at 679.

<sup>194</sup> *Id.* at 680.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Mars Steel*, 834 F.2d at 680.



First, the Seventh Circuit readily acknowledged that it is common for a district court to defer a class certification for trial while there are ongoing settlement negotiations.<sup>199</sup> Second, the court of appeals conceded that a district judge’s deferring a class certification during ongoing settlement negotiations clashes with pertinent language in Rule 23(c)(1).<sup>200</sup> But even more importantly, the Seventh Circuit acknowledged that a court’s deferring a class certification—because of contemporaneous settlement negotiations—creates numerous practical problems for class members.<sup>201</sup>

What are those additional judge-made perils that class members must anticipate and confront? Settlement negotiations become significantly more complicated (1) when litigants do not know whether they are attempting to settle a class action or just an action that only addresses the named plaintiffs’ interests, (2) when class members do not trust the named plaintiffs—fearing that the latter will not adequately represent all members’ interests if a trial on the merits occurs,<sup>202</sup> and (3) when the class members are ignorant about the composition and size of the class.<sup>203</sup>

Moreover, a federal district judge’s waiting until a few interested parties certify and negotiate a class action settlement produces several other adverse consequences and risks for class members. Some noted problems are (1) premature and even collusive settlements, (2) an extremely low probability of a district court certifying a class action for trial, and (3) class members’ greater inability to opt out of a class action settlement when they do not receive a prompt notice.<sup>204</sup>

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* The named plaintiffs in the *Mars* suit filed their complaint in 1985, but the district judge did not certify it as a class action until 1986. Moreover the judge certified the suit only for purposes of settlement. And to repeat an earlier observation, the district judge approved the *Mars* settlement preliminarily before notifying the members of the class. *Id.* However, Federal Rule of Civil Procedure 23(c)(1) states: “At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.” FED. R. CIV. P. 23(c)(1).

<sup>201</sup> *Mars Steel*, 834 F.2d at 680.

<sup>202</sup> See *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 532–33 (3d Cir. 2004) (recognizing that class members must anticipate and confront the risks of interclass conflicts and dueling class action before commencing a lawsuit and noting that “some courts have created subclasses of class action plaintiffs where there are conflicts of interest among class members” (citing *Davis v. Weir*, 497 F.2d 139, 147 (5th Cir. 1974)) (noting that subclasses are generally utilized to eliminate antagonistic interests within a class)); *Am. Fin. Sys. Inc. v. Harlow*, 65 F.R.D. 94, 109 (D. Md. 1974) (encouraging combination of subclasses into one class where interests of class are not antagonistic).

<sup>203</sup> *Mars Steel*, 834 F.2d at 680.

<sup>204</sup> See *id.* at 680–81.

Certainly, class action members and their representatives must conquer certification hurdles and overcome many additional procedural and substantive barriers if they expect to prevail. But in truth, class action defense lawyers are the ones who generate those perils by raising and crafting a variety of general or affirmative defenses.<sup>205</sup> For example, in a class action, defense counsels must prepare for and overcome known risks. Two of the most obvious risks are: (1) federal district courts prevent class action defendants from raising an assortment of procedural and substantive defenses, thereby forcing defendants to settle a class action prematurely or begrudgingly; or (2) district courts allow defendants to advance certain defenses in a trial where a jury rejects them, thereby still causing a premature or a more expensive class action settlement.<sup>206</sup>

Finally, abuse of judicial discretion is arguably the most egregious risk that defendants will face when defending against class actions. For example, abuse of discretion can occur when a federal district court rests its decision “upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.”<sup>207</sup> To prove that federal district judges abuse their authority, class action defendants often cite “questionable” or “unwarranted” class certifications.<sup>208</sup> In fact, some defendants have charged and appellate courts have found that: (1) district courts embraced class action plaintiffs’ flimsy evidence and used that questionable evidence to certify a class,<sup>209</sup> (2) district judges certified class actions even when plaintiffs’ claims were too individualized to satisfy Rule 23(a)’s commonality and Rule 23(b)(3)’s predominance requirements,<sup>210</sup> and (3) district courts certified class actions without making proper findings of fact and without applying controlling legal principles.<sup>211</sup>

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<sup>205</sup> See *infra* note 206.

<sup>206</sup> See generally THOMAS E. WILLGING & SHANNON R. WHEATMAN, ATTORNEY REPORTS ON THE IMPACT OF AMCHEM AND ORTIZ ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION: A REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING A CASE-BASED SURVEY OF ATTORNEYS 30–43 (Washington, DC: Federal Judicial Center, 2004) (reporting class action defense attorneys’ perceptions about state and federal courts’ procedural and substantive rulings and the relationships between those rulings and attorneys’ various choices—whether to settle, remove, or litigate the class actions).

<sup>207</sup> *In re The Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 299 (3d Cir. 1998) (quoting *Int’l Union, UAW v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir. 1987)).

<sup>208</sup> See *infra* note 209–11.

<sup>209</sup> See, e.g., *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 263–63 (5th Cir. 2007).

<sup>210</sup> See *In re LifeUSA Holding Inc.*, 242 F.3d 136, 145–48 (3d Cir. 2001); see also *Cole v. General Motors Corp.*, 484 F.3d 717, 730 (5th Cir. 2007) (“Plaintiffs have failed

### 3. *Proven Perils of Litigating Class Actions in State Courts*

Persons who litigate class actions in state courts often must contend with established risks, like those that class action litigants face in federal courts.<sup>212</sup> The reason is found in an earlier observation: federal and state courts’ class action practices and procedural rules are very similar.<sup>213</sup> In fact, many states have completely adopted the federal class certification requirements and procedures.<sup>214</sup> Therefore, like their counterparts in federal courts, class representatives frequently have difficulty securing class certification in state courts.<sup>215</sup>

Among other explanations, state courts are less likely to certify classes because class representatives do not establish that: (1) the class representatives and attorneys are competent to represent all class members’ inter-

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to adequately address, much less ‘extensively analyze,’ the variations in state law ... and the obstacles they present to predominance. The district court was not in a position to determine that ‘questions of law and fact common to the members of the class predominate’ in the vacuum created by plaintiffs’ omission. Given these significant variations in state law and the multiple individualized legal and factual questions they present, we conclude that plaintiffs have failed to carry their burden in establishing predominance and that the district court abused its discretion in certifying the class action.” (citing *Spence v. Glock*, 227 F.3d 308, 313 (5th Cir. 2000); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742–43 & n.15 (5th Cir. 1996))).

<sup>211</sup> See, e.g., *Gunnells v. Healthplan Servs. Inc.*, 348 F.3d 417, 421 (4th Cir. 2003) (“The district court conditionally granted class certification against the plan’s claims administrator, Healthplan Services Inc., as successor in interest to Third Party Claims Management, Inc. (collectively, “TPCM”) and against individual and corporate insurance agents who marketed and sold the plan. The court properly applied controlling legal principles and made well-supported factual findings supporting its decision to certify a class action against TPCM; thus, we see no abuse of discretion in that decision. However, because the court rested its class certification against the individual agents on findings grounded in a misapprehension of governing law, we must conclude that the court did abuse its discretion in certifying those separate class actions.”).

<sup>212</sup> See cases cited *infra* note 214.

<sup>213</sup> *Id.*

<sup>214</sup> See, e.g., *Campbell v. New Milford Bd. of Ed.*, 423 A.2d 900, 903 (Conn. Super. Ct. 1980) (“Since the requirements for certification of class actions in federal court under rule 23 of the Federal Rules of Civil Procedure are substantially similar to the Practice Book requirements, federal case law may be used to aid our construction of these requirements.” (footnote omitted)); *Hutson v. Rexall Sundown, Inc.*, 837 So.2d 1090, 1092 (Fla. Dist. Ct. App. 2003) (reporting that Rule 1.220(a) of Florida Rules of Civil Procedure requires a party to establish numerosity, commonality, typicality and adequacy of representation, and, that Rule 1.220(b)(3) requires plaintiffs to prove predominance, superiority, and manageability).

<sup>215</sup> See cases cited *supra* note 214.

ests,<sup>216</sup> (2) the proposed class presents predominant, common questions of law and fact,<sup>217</sup> (3) the representatives can manage a nationwide class action in a state court,<sup>218</sup> (4) subclasses can protect the various legal rights of numerous class members,<sup>219</sup> and (5) the representative can manage fairly and efficiently competing state laws in a state court trial.<sup>220</sup> Furthermore, even after a state court certifies a class for trial, representatives still must confront some burdensome challenges—preventing a “claim-jumping” assault,<sup>221</sup> overcoming “causation barriers,”<sup>222</sup> and proving “individual damages.”<sup>223</sup>

<sup>216</sup> See, e.g., *Wash. Mut. Bank v. Super. Ct.*, 15 P.3d 1071, 1082 (Cal. 2001) (reiterating that “the class action proponent bears the burden of establishing the propriety of class certification”); *Smith v. Nat’l Sec. Corp.*, No. D043779, 2005 WL 1060249, at \*5 (Cal. Ct. App. May 6, 2005) (identifying several problems with the class action lawsuits: counsel’s inadequacy to represent the class and the lack of a predominance of common issues among class members); *Bolt v. City of Lansing*, 604 N.W.2d 745, 755 (Mich. Ct. App. 1999) (emphasizing that class certification, notice and fair representation are notorious “class-action problems” (citing *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1357 (5th Cir. 1979))).

<sup>217</sup> See *Hannan v. Weichert South Jersey, Inc.*, 2007 WL 1468643, at \*10 (N.J. Super. Ct. App. Div. May 22, 2007) (embracing the view that “special problems” prevent a party from proving deception—based on oral and written misrepresentations and omissions of material fact—in a class action because “there is a significant risk that individual issues will overwhelm those common to the class” (citing *Stephenson v. Bell Atl. Corp.*, 177 F.R.D. 279, 290 (D.N.J. 1997) (quoting *Davis v. S. Bell Tel. & Tel. Co.* 158 F.R.D. 173, 175 (S.D. Fla. 1994))); see also *Brooks v. Norwest Corp.*, 103 P.3d 39, 49–50 (N.M. Ct. App. 2004) (confirming that “a whole range of practical problems ... may render the class action inappropriate in any given case.... [including] class size, whether notice can reasonably be effected, and the overwhelming presence of individual issues” (citing *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 164 (1974))).

<sup>218</sup> See *Doyle v. Fluor Corp.*, 199 S.W.3d 784, 790 (Mo. Ct. App. 2006) (embracing the view that “[m]anageability encompasses the gamut of practical problems that could render the class action format inappropriate for a particular matter”) (citation omitted).

<sup>219</sup> *Aljabi v. Pardee Const. Corp.*, No. D037746, 2002 WL 254407, at \* 5 (Cal. Ct. App. Feb. 22, 2002) (concluding that the class action representatives “did not meet their burden of showing how subclasses could be formed to lessen the problems inherent in class actions where some [complaining homeowners] were bound by an arbitration clause and others were not” (citing *Wash. Mut. Bank*, 15 P.3d at 1085 (holding that “a class action proponent must credibly demonstrate, through a thorough analysis of the applicable state laws, that state law variations will not swamp common issues and defeat predominance”))).

<sup>220</sup> See, e.g., *Wash. Mut. Bank*, 15 P.3d at 1085 (concluding that a nationwide class action representative’s “presentation must be sufficient to permit the trial court, at the time of certification, to make a detailed assessment of how any state law differences could be managed fairly and efficiently at trial”).

<sup>221</sup> See, e.g., *Ex parte State Mut. Ins. Co.*, 715 So.2d 207, 212 (Ala. 1997) (outlining the “claim-jumping” problem and practice in which Plaintiff A files a purported class

Furthermore, like federal judges, state judges have broad discretion to decide whether to certify class actions for a settlement or a trial.<sup>224</sup> Of course, a universal, iron-clad standard does not exist for determining whether state judges have abused their discretion.<sup>225</sup> However, most state supreme courts have embraced a multipronged standard: abuse of discretion occurs when a trial judge (1) acts arbitrarily, (2) acts unreasonably, (3) fails to apply the law properly to undisputed facts, or (4) uses insufficient evidence to fashion rulings.<sup>226</sup>

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action in County Z and invests a considerable amount of time to certify a class, only to discover that another party—Plaintiff B—made an exact copy of Plaintiff A’s complaint, inserted the name of a different plaintiff and successfully certified a class action in a different court in County Y).

<sup>222</sup> See, e.g., *S.W. Ref. Co. v. Bernal*, 22 S.W.3d 425, 440 (Tex. 2000) (discussing a personal-injury, class action suit and highlighting the problems of creating a class for “general causation” issues, and another class for “specific causation” issues); *Charles I. Friedman, P.C. v. Microsoft Corp.*, 141 P.3d 824, 828 (Ariz. Ct. App. 2006) (Baker, J., concurring) (“[The] class counsel filed a joint application for attorneys’ fees [for] \$34.8 million.... [and] provided evidence of risks that were inherent in the class action, such as ... the difficulty of certifying a class ... and causation barriers.”).

<sup>223</sup> See *Zanakis-Pico v. Cutter Dodge, Inc.*, 47 P.3d 1222, 1248 (Haw. 2002) (“Aggregating the damage of the class presents its own problems .... Even assuming that each plaintiff’s ‘insubstantial loss’ may be aggregated [to meet] a substantiality threshold, an individual plaintiff’s claim, prior to certification, remains vulnerable to dismissal. Many class action lawsuits are initially begun by one plaintiff, who files a complaint, and ... attempts to certify the class. A defendant may file a Rule 12(b) motion to dismiss for failure to state a claim prior to this certification.”); *California v. Levi Strauss & Co.*, 715 P.2d 564, 570 (Cal. 1986) (stressing that “[d]amage distribution ... poses special problems in consumer class actions. Often, proof of individual damages by competent evidence is not feasible. Each individual’s recovery may be too small to make traditional methods of proof worthwhile. In addition, consumers are not likely to retain records of small purchases for long periods of time.”).

<sup>224</sup> See, e.g., *Muise v. GPU, Inc.*, 851 A.2d 799, 810 (N.J. Super. Ct. App. Div. 2004) (“Class certification decisions rest in the sound discretion of the trial court.”). But see *St. Louis Sw. Ry. Co. v. Voluntary Purchasing Grps, Inc.*, 929 S.W.2d 25, 29–30 (Tex. Ct. App. 1996) (“[T]his [c]ourt should reverse the certification order only if the record shows a clear abuse of discretion.”).

<sup>225</sup> See *Flagg v. Essex County Prosecutor*, 796 A.2d 182, 187 (N.J. 2002) (“Although the ordinary ‘abuse of discretion’ standard defies [a] precise definition, it arises when a decision is ‘made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis.’” (quoting *Achacoso-Sanchez v. I.N.S.*, 779 F.2d 1260, 1265 (7th Cir. 1985))).

<sup>226</sup> See *Kondos v. Lincoln Prop. Co.*, 110 S.W.3d 716, 720 (Tex. Ct. App. 2003); see also *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985) (concluding that an abuse of discretion occurs if a trial court acts without reference to any guiding principles, arbitrarily, or unreasonably).

Also, like their counterparts in federal courts, state court defendants often assert that state courts are abusive and issue questionable class certifications,<sup>227</sup> and there is evidence that verifies that such accusations are very real and widespread.<sup>228</sup> For example, even when a state statute clearly notes that a class representative must file an original class certification complaint, that rule has been ignored.<sup>229</sup> In fact, one state court judge allowed a representative to commence a class action after instructing the representative to amend his personal complaint.<sup>230</sup> The class representative only had to insert the new class action allegations and the names of additional parties.<sup>231</sup>

Additionally, state court judges have committed major abuses by certifying class actions when there is an “insufficient [amount of] community of interest” among class members,<sup>232</sup> or when representatives fail to identify those who would comprise a “community of interest.”<sup>233</sup> To illustrate, consider the facts and the trial court’s ruling in *Gardner v. South Carolina Department of Revenue*.<sup>234</sup> In that case, the class action complaint had two defects: (1) factual differences among class members’ individualized cases were numerous, and (2) the named plaintiffs could not prove a common-

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<sup>227</sup> See *infra* notes 230–32.

<sup>228</sup> See *infra* notes 230–32.

<sup>229</sup> See, e.g., PA. R. OF CIV. P. 1703(a) (“A class action shall be commenced only by the filing of a complaint with the prothonotary.” The explanatory note to Rule 1703 states in relevant part that “[a] class action may not be commenced by ... assumpsit, trespass or equity rules.... [Therefore,] if the complaint does not comply with Rule 1704, it will not commence a class action.”).

<sup>230</sup> See, e.g., *Debbs v. Chrysler Corp.*, 810 A.2d 137, 149–50 (Pa. Super. Ct. 2002) (“[T]he trial court abused its discretion when it permitted Debbs to amend his individual complaint with class action allegations and new parties because such was not permitted by Rules 1703 or 1704.”).

<sup>231</sup> *Id.*

<sup>232</sup> See *City of San Jose v. Super. Ct. of Santa Clara Cnty.*, 525 P.2d 701, 713 (Cal. 1974) (holding that the trial court abused its discretion by certifying a class action suit against the City of San Jose on behalf of all real property owners ‘in the flight pattern’ of the San Jose Municipal Airport, because there was an insufficient community of interest to sustain a class action suit).

<sup>233</sup> See *Intercontinental Hotels Corp. v. Girards*, No. 05-02-01604-CV, 2004 WL 423115, at \*2 (Tex. Ct. App. Mar. 2, 2004) (“[I]t is impossible to identify] the class members from the voluminous list of telephone numbers .... Because there is no evidence in the record that the telephone logs can be used to determine the names of the class members or that the class members are presently ascertainable from any other source, we conclude the class definition fails to show the class members are presently ascertainable. Accordingly, the trial judge abused his discretion in certifying the class.”).

<sup>234</sup> *Gardner v. S.C. Dep’t of Revenue*, 577 S.E.2d 190 (S.C. 2003).



ality among defendants’ class defenses.<sup>235</sup> Yet, the trial judge inappropriately certified the class.<sup>236</sup>

Perhaps, the most frequent abuse of discretion occurs when a state judge certifies a class without determining whether the proposed class action will be an efficient and a superior method to resolve the conflict.<sup>237</sup> To highlight this type of abuse, consider a few facts in *Banks v. New York Life Insurance Co.*<sup>238</sup> Plaintiffs filed a class action against the insurer,<sup>239</sup> petitioning the lower court to certify a class because the insurance consumers did not have the financial means to file individual lawsuits to secure damages for numerous small claims.<sup>240</sup> The trial court certified the class,<sup>241</sup> but the insurer appealed, asserting that the court abused its discretion.<sup>242</sup> A sympathetic Louisiana Supreme Court agreed, concluding that special circumstances required “a multitude of mini-trials” rather than the more superior and efficient class action.<sup>243</sup>

#### 4. Imaginary Risks of Litigating Class Actions in Federal and State Courts

Even a cursory review of legal commentaries, editorials, and various trade publications reveals an inordinate amount of discussion about the

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<sup>235</sup> *Id.* at 201 (“A representative class cannot exist where the court must investigate each plaintiff’s prejudice claim where it is one of the two predominate issues in the case. Requiring such individualized examination negates the benefits of a class action suit.... Likewise, [n]amed [p]laintiffs cannot show that commonality exists for the defendant class. A court determines the existence of commonality among defendants by examining the plaintiffs’ claims and the defendants’ anticipated defenses.”).

<sup>236</sup> *Id.* (“[T]he trial judge erred by certifying both a plaintiff and a defendant class.”).

<sup>237</sup> *See infra* note 243.

<sup>238</sup> *Banks v. N.Y. Life Ins. Co.*, 737 So.2d 1275 (La. 1999).

<sup>239</sup> *Id.* at 1277 (“Major Banks and Charles Edwards, individually and on behalf of all other persons similarly situated, filed [a] suit ... against New York Life Insurance Company ... and two Louisiana insurance agents for New York Life.... [alleging] that New York Life used unfair and deceptive practices [when issuing and selling] insurance policies. Plaintiffs sought damages and a judgment certifying a class composed of all persons who purchased whole or universal life policies ....”).

<sup>240</sup> *Id.* at 1277–78, 1283.

<sup>241</sup> *Id.* at 1277.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 1283 (“Moreover, we conclude that a class action would not be superior to other procedural methods in this case when we balance in terms of fairness and judicial efficiency the merits of a class action against alternative procedural methods.... Accordingly, we find that the trial judge abused his discretion in granting class certification in this matter.”).

widespread “evils of class actions” in both federal and state courts.<sup>244</sup> In fact, even otherwise intelligent and thoughtful members of Congress have cited such allegedly “widespread” imaginary perils as reasons to move substantially large numbers of so-called “class actions of national importance” from state to federal courts.<sup>245</sup> Arguably, the massive removal of state substantive law class actions from state to federal courts does not comport with longstanding principles of judicial federalism. But even more importantly, none of the alleged widespread evils or perils have been substantiated, using carefully designed empirical studies and sound statistical analyses.<sup>246</sup>

Make-believe federal class action “evils” appear under two headings—the alleged perils of class action trials and the purported ills of class action settlements.<sup>247</sup> Class action reformers—an assortment of commentators, insurers, and corporate entities—argue that federal class action trials are replete with a plethora of evils.<sup>248</sup> The list includes allegedly “unmeritorious claimants, greedy plaintiffs’ lawyers, a destroyed corporate citizen, and a besieged judiciary.”<sup>249</sup> But to repeat, reformers have not cited any carefully constructed empirical studies or sound evidence to support their imaginations about the mass evils that are supposedly undermining federal class action trials and procedures.<sup>250</sup>

In addition, class action reformers assert that even more pervasive, virulent, and unrelenting evils infect federal class action settlements. So-called “sweetheart” and “blackmail” settlements have been cited as major

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<sup>244</sup> See, e.g., Nancy T. Bowen, *Restrictions on Communication by Class Action Parties and Attorneys*, 1980 DUKE L.J. 360, 361 (“Attorney solicitation of clients, funds, and fee agreements is one of the most prevalent perceived evils of the class action procedure.”).

<sup>245</sup> See, e.g., *infra* notes 249–54, 386–90 and accompanying text.

<sup>246</sup> See, e.g., *infra* notes 249–54.

<sup>247</sup> *Infra* notes 249–54.

<sup>248</sup> *Infra* notes 249–54.

<sup>249</sup> Cf. Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 188 (1998) (asserting without proof or documentation that “widespread judicial concern over the lack of concrete evidence of causation of harm paint[s] a picture representing all of the evils of mass tort class actions”).

<sup>250</sup> *Id.*; see also James M. Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 416 (2004) (“[W]hile little empirical research has been done fleshing out the evils of class actions or even firmly establishing that such demons exist, a widespread perception exists among the public, politicians, scholars and reformers, that there is a problem with class actions as they are currently maintained in our courts.” (citation omitted)).

examples of class action horrors.<sup>251</sup> More specifically, reformers accuse class counsels of fashioning self-interested “sweetheart” agreements, under which the attorneys secure favorable sums of money while compromising class members’ interests.<sup>252</sup> Attorneys are also accused of using blackmail to force federal defendants to settle class actions for more than the suits are worth.<sup>253</sup> Furthermore, without presenting a modicum of probative or statistical evidence, one reformer lengthened the list of imaginary evils by asserting that: (1) “pro-settlement incentives” cause federal district judges to make questionable class action decisions, and (2) large class actions impair or undermine federal district judges’ ability to discern whether settlements are employed to bribe “abusive” class action complainants.<sup>254</sup>

Perhaps reformers, national insurers, and corporate entities have lobbied the most abrasive and unsupported perceptions about class actions that have been litigated in state courts. For example, from 2003 to 2006, the American Tort Reform Foundation (ATRF)<sup>255</sup> published documents

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<sup>251</sup> See Bruce L. Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1378–79 (2000) (documenting and explaining critics’ assertions that “sweetheart” and “blackmail” settlements are two dangers inherent in class actions). But see Allan Kanner and Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681, 693–97 (2005) (“[T]he Blackmail Myth fails to comport with factual reality.... [because] available empirical evidence and a consideration of how federal judges typically manage class actions each suggest that the alleged ‘hydraulic pressure on defendants to settle’ is itself more myth than reality.” (citation omitted)).

<sup>252</sup> See Hay & Rosenberg, *supra* note 251, at 1377.

<sup>253</sup> See *id.* at 1391. But see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92 HARV. L. REV. 664, 665–66 (1979) (“[L]awyers and litigants on both sides of [class action lawsuits]” have abused Federal Rule 23 and engaged in “unprofessional practices” involving “attorneys’ fees, ‘sweetheart’ settlement deals, dilatory motion practice, harassing discovery, and misrepresentations to judges.”).

<sup>254</sup> See, e.g., Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL’Y 855, 880–81 (2005) (“[L]arge class actions result in twin, related evils: courts make decisions under the influence of pro-settlement incentives and ... are unable to accurately identify when settlements are simply pay-offs to abusive ... litigants.”).

<sup>255</sup> See *About ATRA*, AM. TORT REFORM ASS’N (ATRA), <http://www.atra.org/about> (last visited Mar. 9, 2012) (“[ATRA is a] nationwide network of state-based liability reform coalitions .... [that is] dedicated exclusively to tort and liability reform .... ATRA’s membership is diverse and includes nonprofits, small and large companies, as well as state and national trade, business, and professional associations.... ATRA supports an aggressive civil justice reform agenda that includes ... class action reform ....”).

that listed and criticized so-called “judicial hellhole” jurisdictions.<sup>256</sup> According to ATRF, certain state courts<sup>257</sup> are “abusive,” because those tribunals allegedly decide questions of law and fact against defendants consistently—large insurers, insured corporate entities and the medical industry to name a few.<sup>258</sup>

ATRF developed an extensive list of purported abuses that appear in state courts.<sup>259</sup> Several class action ills appeared among the purported state court evils.<sup>260</sup> Specifically, ATRF asserted that state court judges consistently “[join claims to form] mass actions that do not have common facts and circumstances.”<sup>261</sup> ATRF also maintained that state court judges constantly “certify classes that do not have sufficient commonality of facts or law, which may confuse a jury and make the case difficult to defend.”<sup>262</sup> Even more relevant, ATRF shared its findings with members of Congress,

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<sup>256</sup> See generally Archive, *Judicial Hellholes*, AM. TORT REFORM FOUND., <http://www.judicialhellholes.org/archive-2005/> (last visited Mar. 25, 2012).

<sup>257</sup> See *id.* (showing that ATRA identified the following jurisdictions as the 2005 “judicial hellholes”: The Rio Grande Valley and Gulf Coast in Texas; Cook County, Illinois; the entire State of West Virginia; Madison County, Illinois; St. Clair County, Illinois; and South Florida).

<sup>258</sup> See generally *Judicial Hellholes 2005*, AM. TORT REFORM FOUND., 13–37, available at <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2005.pdf> (last visited Mar. 9, 2012).

<sup>259</sup> See *id.* at 8–9 (“Judges in Judicial Hellholes hold considerable influence over ... cases that appear before them.... [and] are known for being plaintiff friendly.” Therefore, those allegedly pro-plaintiffs’ judges (1) “do not stop ... forum shopping”; (2) “allow lawsuits to go forward that are not supported by the law”; (3) “allow unnecessarily broad, invasive and expensive discovery requests to increase the burden on a defendant,” (4) “schedule cases [unfairly] .... [by] giving defendants [only a week’s notice before a trial begins],” (5) “allow plaintiffs’ lawyers to introduce highly questionable ‘expert’ testimony that purports to link the defendant to the plaintiffs’ injuries, but has no credibility in the scientific community,” (6) “allow plaintiffs [to introduce a greater variety ] of evidence ... at trial while rejecting evidence that might be favorable to a defendant,” (7) “[give] improper or slanted jury instructions,” (8) “[do not overturn] extraordinary punitive or pain and suffering awards,” (9) “[allow trial lawyers’ contributions to influence] their judicial decisions,” and (10) “[develop unwarranted] cozy relations ... [with] jurists, plaintiffs’ lawyers and government officials.”).

<sup>260</sup> See *id.*

<sup>261</sup> *Id.* at 9 (“In one notorious example, in 2002, West Virginia courts consolidated more than 8,000 claims and 250 defendants in a single trial. In situations where there are so many plaintiffs and defendants, individual parties are deprived of their rights to have their cases fully and fairly heard by a jury.”).

<sup>262</sup> *Id.*

and the organization reported that its findings helped to enact the Class Action Fairness Act of 2005.<sup>263</sup>

Of course, using the most conservative measures and estimates, ATRF’s “judicial hellholes” data and conclusions are highly suspect.<sup>264</sup> Among other reasons, the organization selected just a few jurisdictions within some states and only a few courts within those jurisdictions to examine the disposition of class actions.<sup>265</sup> Clearly, those less-than-random selections could easily support one’s imaginations about the prevalence of class action evils in state courts, because arguably unscientific sampling and methodological procedures generated ATRF’s questionable data. Even a cursory analysis strongly suggests that “selectivity bias”<sup>266</sup> permeates ATRF’s findings and conclusions.<sup>267</sup> But more importantly, those findings deviate substantially from findings that are based on considerably more sound empirical research.<sup>268</sup>

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<sup>263</sup> See *id.* at 4 (“The Judicial Hellholes report has been covered in nearly every major U.S. newspaper since the first report published in 2002. The term ‘Judicial Hellhole’ firmly entered the American lexicon when ... President George W. Bush ... visited the Number 1 Judicial Hellhole, Madison County, Illinois, to draw attention to the detrimental impact of litigation abuse on the local area. The Judicial Hellholes report also was central in the debate on the Class Action Fairness Act, which was ultimately enacted after languishing in Congress for nine years.” (footnote omitted)).

<sup>264</sup> See *Judicial Hellholes 2005*, *supra* note 258, at 5 (“ATRF interviewed individuals familiar with litigation in the Judicial Hellholes and verified their observations through independent research of press accounts, studies, court dockets and judicial branch statistics, and other publicly available information. Citations for these sources can be found in the nearly 500 endnotes following this report.”).

<sup>265</sup> See *id.* at 4–5.

<sup>266</sup> See Willy E. Rice, *Judicial Bias, The Insurance Industry and Consumer Protection: An Empirical Analysis of State Supreme Courts’ Bad-Faith, Breach-of-Contract, Breach-of-Covenant-of-Good-Faith and Excess-Judgment Decisions, 1900–1991*, 41 CATH. U. L. REV. 325, 375–76 (1992) (explaining, discussing and testing for “selectivity bias” in “choice data”—also known as “other- and self-selection data”).

<sup>267</sup> See *Judicial Hellholes 2005*, *supra* note 258, at 4–5.

<sup>268</sup> Cf. William S. Lerach, *Securities Class Actions and Derivative Litigation Involving Public Companies: One Plaintiff’s Perspective*, 670 PLI/Corp 471, \*536 n.79 (1990) (“Contrary to much of the accepted ‘lore’ about abuses of the class action procedure, one recent empirical study has concluded ‘when shareholders press their cases, their chances of obtaining some measure of relief are quite good; over 75% of such cases resulted in either settlements, accommodation by the defendants, or a judgment in favor of the plaintiffs.... Shareholder litigation is an important means of oversight.... The empirical evidence also implies that in settled class actions, particularly in the securities and treble damage antitrust contexts, the great bulk of the money received from the defendants actually is distributed to class members, in contrast to the widely held notion that the fund is either devoured by avaricious attorneys or consumed by administrative expenses.’” (citation omitted)); see also Miller, *supra* note 253, at 666–67 (“Even if the negative

### III. THE CLASS ACTION DEBATE—INSURED CORPORATE ENTITIES, NATIONAL INSURERS AND “BRIGHT LINE” JUDICIAL FEDERALISM

Again, judicial federalism embodies “a proper respect for state functions,”<sup>269</sup> and it is built on a liberal conviction: a national government thrives and functions best when states and their institutions are free to perform their respective functions in different ways.<sup>270</sup> In addition, judicial federalism does not draw a shimmering bright line between federal and state courts’ respective powers.<sup>271</sup> Yet all too many large corporations, including national and multinational insurers, see a discernible, constitutional bright line. On one side, companies see state courts, which generate and use fifty-one different sets of laws that are used to “regulate” commerce and resolve legal disputes within those respective jurisdictions. On the other side, corporate defendants see twelve federal circuits, which often employ conflicting laws of the circuits and conflicting laws of the panels to decide disputes involving interstate commerce.

One insightful commentator has noted corporate America’s major unease about litigating in dual judiciaries generally and about litigating class actions in particular.<sup>272</sup> Paraphrasing, he described corporate entities’ concern this way: a fundamental conflict exists between the basic principles of federalism and the collective economic and survival interests of insurance companies and other multinational and national corporations.<sup>273</sup> Absent any meaningful uniform, predictable, objective or reliable rulings within and between the two judiciaries, corporations as well as insurance companies—on behalf of themselves and millions of insured businesses

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effects of class actions were assumed, they would have to be balanced against the societal benefits derived from deterring socially proscribed conduct and providing small claim rectification.... The available information suggests that much of the debate has been based on erroneous assumptions.... Although there have been instances of undesirable or unprofessional conduct, abuse does not appear to have been widespread. Stories about a few questionable occurrences have been repeated so often at professional meetings that they have created the impression that evils are commonplace in class action practice.” (footnotes omitted)).

<sup>269</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>270</sup> *See id.*

<sup>271</sup> *See New York v. United States*, 505 U.S. 144, 155 (1992) (“[W]hile the Tenth Amendment makes explicit that ‘[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people[.]’ the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court’s most difficult and celebrated cases.”).

<sup>272</sup> *See generally* Arthur Bryant, *The Conflict Between Federalism and Corporate Interests*, 31 SETON HALL L. REV. 734, 734–36 (2001).

<sup>273</sup> *See id.* at 734–35.



and corporate entities—must spend enormous amounts of money if they expect to prevail in state and federal courts.<sup>274</sup>

Therefore, viewed from this perspective, one’s discovering that corporations, insurers, and their insured corporate entities campaign fervently and spend lots of money to fashion a “more efficient” judicial federalism should produce little surprise.

But again, corporate entities’ generalized concerns about litigating in dual judiciaries are arguably unfounded. On the one hand, large corporate conglomerates and insurers bellow for a set of standardized, substantive rules that would produce more predictable, uniform, and reliable judicial rulings—regardless of the court in which they litigate.<sup>275</sup> Yet the same corporate entities arguably want a set of loosely defined procedural rules that would allow corporate defendants to move freely between state and federal courts—always having the option to litigate in either forum to help increase their likelihood of securing more favorable judicial hearings and dispositions.<sup>276</sup>

Using the recently enacted Class Action Fairness Act of 2005 as a point of reference, this Part discusses insurers and other corporate entities’ ostensible quests for more efficient judicial proceedings as well as for more favorable and predictable judicial outcomes. The evidence, however, reveals the following: large insurers and other corporations’ calls for class action reforms are likely a stellar campaign to win the majority of class actions, either in federal courts or by preventing disgruntled consumers and third-party victims from litigating those actions in allegedly biased and hostile state courts.<sup>277</sup> Finally, as some commentators have observed,

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<sup>274</sup> See TOWERS PERRIN, DIRECTORS AND OFFICERS LIABILITY: 2006 SURVEY OF INSURANCE PURCHASING AND CLAIMS TRENDS 10 (2006), available at <http://www.directorsandboards.com/DBEBRIEFING/May2007/TowersSurvey.pdf> (last visited Mar. 9, 2012) (reporting that over 99% of public, private and nonprofit corporations and business purchased D&O insurance); see also Martin Boyer, *Is the Demand for Corporate Insurance a Habit? Evidence of Organizational Inertia from Directors’ and Officers’ Insurance*, CENTER FOR INTERUNIVERSITY RESEARCH AND ANALYSIS ON ORGANIZATIONS 1, 3 (2004), available at <http://www.cirano.qc.ca/> (last visited Mar. 9, 2012) (“[P]ublic access to corporate insurance purchases and risk management strategies is limited.... [But] corporate demand for ... Directors’ and Officers’ (D&O) insurance [is available].... [Therefore,] directors and officers’ [demand for insurance] is a proxy for the firm’s risk management strategy.... D&O insurance is quite common amongst U.S. and Canadian public corporations. According to Tillinghast-Towers Perrin ... the proportion of U.S firms that had D&O insurance was 92% in 1998 and 93% in 1999, up from 81% in 1992.”).

<sup>275</sup> Bryant, *supra* note 272, at 735.

<sup>276</sup> See *id.* at 735–36.

<sup>277</sup> See *id.* at 736.

large corporate entities and their insurers are willing to use their individual and combined substantial political clout to achieve that goal,<sup>278</sup> even if corporate defendants' activism against class actions will ultimately undermine or destroy longstanding tenets of judicial federalism.

*A. National and Multinational Insurers and Corporate Entities' Mission: Eradicating Allegedly "Biased" State Court Class Action Proceedings, or "Turning 200 Years of Judicial Federalism on Its Head"?*

Consider the Supreme Court's decision in *United States v. South-Eastern Underwriters Association*.<sup>279</sup> Asserting that state insurance commissioners and regulators failed to curtail insurers' highly questionable ratemaking activities in the early 1940s, a concerned U.S. Attorney General (AG) filed an antitrust suit in a federal district court against South-Eastern Underwriters Association (SEUA)—a conglomerate of insurers and agents.<sup>280</sup> According to the AG's theory, SEUA violated the Sherman Act by conspiring to fix and maintain arbitrary and non-competitive premium rates for fire and specified "allied lines" insurance in six southeastern states.<sup>281</sup> The AG also alleged that SEUA tried to monopolize trade and commerce by selling those same insurance contracts across those southeastern states.<sup>282</sup>

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<sup>278</sup> See, e.g., William M. Welch & Jim Drinkard, *'Patients' Bill of Rights' Pushes Closer to Passage*, USA TODAY, Jun. 18, 2001, available at 2001 WLNR 3764716 ("For five years, health insurance companies have succeeded in blocking proposals to establish broad federal rights for patients covered by managed-care plans. And they have done it against all odds.... Fueled by millions of dollars in political contributions, fat advertising budgets and armies of blue-chip lobbyists, the health insurance industry and its business allies have exercised big-time political clout in spite of managed care's image problems."); see also Editorial, *Insurance, Leader of the PACs, Ready for Capitol Hill Battles*, ATLANTA J. - CONST., May 7, 1991, available at 1991 WLNR 3587217 ("Who has the deepest pockets on Capitol Hill? The insurance industry does. Last year its political action committees contributed \$8.7 million to congressional candidates, earning the industry the distinction of 'leader of the PACs.' According to investigations by the Center for Responsive Politics in Washington, congressional incumbents received most of the insurance money, 13 of whom accepted more than \$50,000 apiece .... With the insurance industry spending so much money on political clout, it's worth wondering what it wants in return.").

<sup>279</sup> *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

<sup>280</sup> See *id.* at 534–35.

<sup>281</sup> *Id.*

<sup>282</sup> See *id.* at 535 (describing the Attorney General's charges that "S. E. U. A. [companies] controlled 90 per cent of the fire insurance and 'allied lines' sold ... in the six states where the conspiracies were consummated. Both conspiracies consisted of a continuing agreement and [concerted] action .... The conspirators ... fixed premium rates[,] ...

As a defense, SEUA asserted that the Sherman Act did not apply to it, because the business of fire insurance was neither intrastate nor interstate commerce.<sup>283</sup> The federal district court agreed and dismissed the case.<sup>284</sup> The AG appealed.<sup>285</sup> In a narrow-majority decision, the Supreme Court determined that the district court’s analysis and conclusion were unsound.<sup>286</sup> Reversing the lower court’s holding, the Court held that the business of insurance involves interstate commerce; therefore, the federal government may regulate it under the Commerce Clause.<sup>287</sup> The Supreme Court’s decision generated a considerable amount of anger and ill-will among insurers and their congressional supporters,<sup>288</sup> so in response, Congress enacted the McCarran-Ferguson Act (MFA)<sup>289</sup> to affirm the principle of state control: barring a few exceptions, only state governments—

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agents’ commissions, [and] employed boycotts ... to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S. E. U. A. ... Companies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged ....” (footnote omitted)).

<sup>283</sup> See *id.* at 536.

<sup>284</sup> See *United States v. South-Eastern Underwriters Ass’n*, 51 F. Supp. 712, 713–14 (D.C. Ga. 1943) (“The business of insurance is not interstate commerce or interstate trade, though it might be considered a trade subject to local laws, either State or Federal, where the commerce clause is not the authority relied upon.”).

<sup>285</sup> See *South-Eastern Underwriters*, 322 U.S. at 533.

<sup>286</sup> See *id.* at 537–38 (The court found the district court’s analysis lacking, stating that “[a]ll of [the] alleged transactions ... constituted a single continuous chain of events, many of which were multistate in character, and none of which ... could possibly have been continued but for that part of them which moved back and forth across state lines .... [The district court concluded that] the indictment [was] bad for the sole reason that the entire ‘business of insurance’ ... can never under any possibly circumstances be ‘commerce’, and that therefore, even though an insurance company conducts a substantial part of its business transactions across state lines, it is not engaged in ‘commerce among the States’ within the meaning of ... the Commerce Clause ....”).

<sup>287</sup> See *id.* at 552–53 (“[The Court’s] basic responsibility [when] interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it. That power ... is vested in the Congress, available to be exercised for the national welfare as Congress shall deem necessary. No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception [for] the business of insurance.”).

<sup>288</sup> See generally 90 CONG. REC. 6,526–27 (1944) (statement of Rep. Larry Miller) (discussing a newspaper article examining the *South-Eastern Underwriters* case).

<sup>289</sup> McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015 (2006)).

legislatures, regulators, and courts—have supreme authority to regulate the business of insurance.<sup>290</sup>

Significantly, when Congress was debating whether to enact the MFA in 1944, national insurers and some of their staunch supporters<sup>291</sup> proclaimed loudly that the Court's *South-Eastern Underwriters* ruling would seriously undermine fundamental principles of judicial federalism.<sup>292</sup> In fact, insurance companies' supporters accused the Supreme Court of "stretching" constitutional principles to the point of undermining and interfering with state courts' constitutional powers to regulate and fashion laws to decide business of insurance controversies.<sup>293</sup> But even more importantly, if one carefully searches mid-twentieth century primary and secondary legal sources, one would be hard pressed to find any evidence of multinational and national insurers embracing this position: state court judges are biased and hostile against insurance companies.

In fact, Congress passed the McCarran-Ferguson Act, in part, because mid-twentieth century insurance companies and their congressional supporters insisted that federal courts were improper forums; thus, those tribunals should not have jurisdiction to hear and decide business of insur-

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<sup>290</sup> See, e.g., 90 CONG. REC. 6,559 (statement of Rep. Hatton Sumners) ("[T]he bill H. R. 3270 [is designed] to affirm the intent of Congress that the regulation of the business of insurance [shall] remain within the control of the several States and that the [antitrust] acts of July 2, 1890 and October 15, 1914, as amended [shall not be] applicable to that business ....").

<sup>291</sup> See, e.g., *id.* at 6,564 (statement of Rep. Vorys). Representative Vorys, one of the insurance industry's most vociferous and unwavering advocates, used even stronger language. He voiced the sentiment of many members by stating, "[m]y father was chairman of a committee of the American Bar Association which drafted a model law[.] ... [It] had a profound effect upon the insurance laws of the Nation .... [because the model helped to fashion] local laws and regulations to meet local conditions, problems and abuses .... The Supreme Court has power to construe the Constitution [and decide] what is interstate commerce[.] [But the Court] does not yet possess the power to make laws. When it attempts to exercise such power, Congress must be vigilant to nullify judicial usurpation." *Id.*

<sup>292</sup> See, e.g., *id.* at 6,561.

<sup>293</sup> See *id.* at 6,559–6,560 (statement of Rep. Hatton Sumners) ("[T]he Supreme Court—and we have helped, too—has been stretching and stretching ... [Constitutional provisions] like the interstate commerce clause, ... stretching them in order to increase Federal power until they have been stretched absolutely beyond where common sense and common honesty .... [I]t is time the judiciary begins to get back on its own side of the fence .... God Almighty has imposed some natural laws that govern the business of judging .... The judges of this country have to be governed by the rules that govern the business of judging.").

ance lawsuits and other insurance-related disputes.<sup>294</sup> To repeat, large insurers attacked the *South-Eastern Underwriters* decision, claiming that the ruling severely undermined fundamental principles of judicial federalism by interfering with and weakening state courts’ jurisdictional powers.<sup>295</sup> Yet, while insisting that only state courts should resolve insurance-related legal disputes, national and multinational insurance companies—as plaintiffs—have not hesitated to file all sorts of actions in federal courts against small-to-large corporations, seeking a variety of equitable and common-law remedies.<sup>296</sup>

In truth, like disgruntled classes of consumers, insurers as plaintiffs have a long history of filing multibillion dollar class actions against other national and multinational corporations in state and federal courts.<sup>297</sup> For example, in 1995, the Federal District Court of New Jersey decided a class action controversy in *Northland Insurance Co. v. Shell Oil Co.*<sup>298</sup> Northland Insurance Company (Northland) filed a putative class action against E.I. DuPont de Nemours and Company, Hoechst-Celanese Corporation, and Shell Oil Company (Shell Oil).<sup>299</sup> Suing on behalf of all similarly situated insurers, Northland accused Shell Oil and others of manufacturing defective polybutylene plumbing systems that damaged homeowners’ property.<sup>300</sup> Citing their respective subrogation rights under the consumers’ property insurance contracts, the class of insurers sought declaratory

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<sup>294</sup> See *id.* at 6,563 (statement of Rep. Charles La Follette) (“Mr. Chairman, I am of the opinion, based upon the language used in this act, that it is specially designed to prevent any Federal court [from] having jurisdiction of pending legislation once this becomes law”).

<sup>295</sup> See *supra* notes 290–93 and accompanying text.

<sup>296</sup> See generally Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds’ Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts’ Declaratory Judgments—1900–1997*, 47 AM. U. L. REV. 1131, 1194–214 (1998) (presenting a case study of insurers, various corporate entities and insurance consumers’ litigation and theories of recovery in state and federal courts).

<sup>297</sup> See, e.g., *Northland Ins. Co. v. Shell Oil Co.*, 930 F. Supp. 1069 (D. N.J. 1996).

<sup>298</sup> *Id.*; see also *infra* note 894 and accompanying text (presenting evidence of national and multinational corporations’ filing class actions against other corporations in state courts).

<sup>299</sup> See *Northland*, 930 F. Supp. at 1070.

<sup>300</sup> See *id.*; see also Rodd Zolkos, *Insurers Sue Pipe Makers: Class Action Brought by Insurers Breaks New Ground*, BUS. INS., Feb. 16, 1998 (“A class-action suit by insurers seeking to recover hundreds of millions of dollars in payment for leaking polybutylene plumbing could have far-reaching implications for both sides.... Leading the suit, which involves a ‘tight group of 40’ insurers and ultimately could take in hundreds ... is Northland Insurance Co.”).

and injunctive relief.<sup>301</sup> However, more relevant, the class of property and casualty insurers wanted Shell Oil to reimburse millions of dollars that the insurers spent to settle homeowners' claims.<sup>302</sup>

Six years after *Northland*, a federal district judge in New York decided *In re Simon II, Litigation*.<sup>303</sup> In that case, Blue Cross & Blue Shield of New Jersey (BCBS)—along with smokers and labor unions—filed a class action against Philip Morris, Inc., the American Tobacco Company, and other cigarette manufacturers.<sup>304</sup> Actually, *Simon II* consolidated all the tobacco-related lawsuits to include punitive damages claims for the various class members.<sup>305</sup> Exercising their respective subrogation rights under health insurance contracts, the insurers alleged that the tobacco industry used deceptive marketing practices that caused policyholders' tobacco-related illnesses and addictions.<sup>306</sup> Therefore, the health insurers sought reimbursement from the tobacco companies to cover the insureds' health costs.<sup>307</sup>

Also, between 2001 and 2004, large health insurers filed three additional class actions in federal courts against large pharmaceutical companies.<sup>308</sup> First, in *Desiano v. Warner-Lambert Co.*,<sup>309</sup> two large health insurance companies filed a consolidated class action in 2001 against Warner-Lambert.<sup>310</sup> Before the federal district judge in New York, the insurers argued that the pharmaceutical company aggressively marketed Rezulin, which was allegedly "the first anti-diabetes drug designed to

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<sup>301</sup> See *Northland*, 930 F. Supp. at 1070.

<sup>302</sup> See *id.*

<sup>303</sup> *In re Simon II, Litig.*, No. 00-CV-5332, 2002 WL 32155895, at \*1 (E.D.N.Y. Sept. 19, 2002).

<sup>304</sup> See *id.* at \*1.

<sup>305</sup> See *Judge Certifies Class-Action Suit Against Tobacco Firms*, RICH. TIMES DISPATCH, Sept. 21, 2002, available at 2002 WLNR 1452025.

<sup>306</sup> See, e.g., *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 138 F. Supp. 2d 357, 360, 363 (E.D.N.Y. 2001) (permitting insurer to recover extra healthcare expenditures for smokers and to provide evidence of "pass on" premium practice).

<sup>307</sup> See *id.* at 363.

<sup>308</sup> See, e.g., *Desiano v. Warner-Lambert Co.*, 326 F.3d 339 (2d Cir. 2003); *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002); *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 929 A.2d 1076 (N.J. 2007); *In re Abbott Laboratories Norvir Anti-Trust Litig.*, Nos. C 04-1511 (CW), C 04-4203 (CW), 2007 WL 1689899 (N.D. Cal. 2007).

<sup>309</sup> *Desiano*, 326 F.3d at 339.

<sup>310</sup> See *id.* at 340–41 ("Louisiana Health Service Indemnity Company ... is a Blue Cross/Blue Shield health benefit provider ... with headquarters in Baton Rouge, Louisiana .... Eastern States Health and Welfare Fund ... [is an Employee Retirement Income Security Act] plan that provides benefits to members of the Needletrades, Industrial, and Textile Employees Union [and] is based in New York.").



[improve one’s] insulin resistance”; however, the company priced the drug “at nearly three times the cost” of other diabetic medication.<sup>311</sup> Also, the medication had a greater likelihood of causing liver damage than a placebo.<sup>312</sup> Thus, the insurers sought class relief on behalf of all health benefit providers that paid for Rezulin between 1997 and 2001.<sup>313</sup> And the insurers wanted to recoup “approximately \$1.4 billion” that they had paid for the defective drug.<sup>314</sup>

The second case, *In re Buspirone Patent Litigation*,<sup>315</sup> highlights the class action that dozens of health insurance companies or “end payors”<sup>316</sup> filed against Bristol-Myers Squibb pharmaceutical company.<sup>317</sup> The class of insurers alleged that Bristol-Myers violated federal antitrust laws by paying Schein Pharmaceuticals Inc. \$72.5 million to keep its generic version of BuSpar off the market.<sup>318</sup> The insurance companies sought class certification to recover large sums of money that they paid to purchase Bristol-Myers’ brand-name drug, since the generic drug was not available.<sup>319</sup>

*In re Abbott Laboratories Norvir Anti-Trust Litigation*<sup>320</sup> involved a heated conflict between Abbott Laboratories and a group of very diverse plaintiffs, including multiple health insurers.<sup>321</sup> Abbott designed and produced Norvir to fight HIV.<sup>322</sup> As a stand-alone drug, Norvir was only minimally effective and its price was relatively low.<sup>323</sup> However, when administered along with a combination of other drugs, Norvir was very

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<sup>311</sup> *Id.* at 342 (internal quotations omitted).

<sup>312</sup> *See id.*

<sup>313</sup> *See id.* at 344.

<sup>314</sup> *See id.* at 345.

<sup>315</sup> *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

<sup>316</sup> *See id.* at 365.

<sup>317</sup> *See* Marie Suszynski, *Health Insurers Sue Bristol-Myers Squibb, Alleging a Drug Monopoly*, BESTWIRE, Dec. 6, 2002 (“The lawsuits [named] several Blue Cross and Blue Shield plans and other health insurers as plaintiffs .... One lawsuit, filed in the Southern District of New York by Blue Cross of California, Blue Cross and Blue Shield of Georgia, Pacific Life & Annuity Insurance Co., Blue Cross Blue Shield of Kansas City, Unicare Life & Health Insurance Company and others, said Bristol-Myers enjoyed a monopoly on the drug and illegally delayed the introduction of a generic drug ....”).

<sup>318</sup> *See id.*

<sup>319</sup> *See In re Buspirone*, 185 F. Supp. 2d at 365–66.

<sup>320</sup> *In re Abbott Labs. Norvir Anti-Trust Litig.*, Nos. C 04–1511 (CW), C 04–4203 (CW), 2007 WL 1689899, at \*1 (N.D. Cal. June 11, 2007).

<sup>321</sup> *See id.*

<sup>322</sup> *See id.*

<sup>323</sup> *See id.*

potent and effective.<sup>324</sup> Therefore, Abbott raised the wholesale price for one hundred and twenty 100-milligram Norvir capsules from about \$206 to \$1,028.<sup>325</sup> That was nearly a four hundred percent increase in the wholesale price of the drug.<sup>326</sup>

Aetna Insurance Company sued Abbott in 2004.<sup>327</sup> And that same year, various other health insurers and health plans commenced a class action against Abbott.<sup>328</sup> Both complaints alleged that the pharmaceutical company unjustly enriched itself by violating Section 2 of the Sherman Act and the California Business and Professions Code.<sup>329</sup> For unexplained reasons, Aetna dropped its lawsuit.<sup>330</sup>

Finally, Merck & Company manufactured and marketed Vioxx, an anti-inflammatory arthritis and acute pain medication.<sup>331</sup> Therefore, in *International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co.*,<sup>332</sup> another diverse group of large health insurers and other corporate entities filed a nationwide class action against Merck in 2005.<sup>333</sup>

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<sup>324</sup> See *id.*

<sup>325</sup> See Business Digest, *Aetna Sues Abbott over 400% Increase in AIDS Drug's Cost*, BALT. SUN, May 28, 2004, available at 2004 WLNR 1483785.

<sup>326</sup> See *In re Abbott Labs.*, 2007 WL 1689899 at \*1.

<sup>327</sup> See Business Digest, *supra* note 325 ("Aetna Inc. has sued pharmaceutical maker Abbott Laboratories Inc., accusing it of seeking a monopoly on AIDS drug by raising the price of its popular drug Norvir by 400 percent.").

<sup>328</sup> See *In re Abbott Labs.*, 2007 WL 1689899 at \*1 ("Plaintiffs now seek to certify the following class: All persons or entities ... who purchased or paid for, or who reimbursed another person or entity who purchased or paid for, Norvir ... plan participants and beneficiaries or insureds, and who paid all or part of the cost of Norvir ... during the period December 3, 2003 through such time in the future as the effects of Defendant's illegal conduct, as alleged, have ceased ....").

<sup>329</sup> See *id.*

<sup>330</sup> See Diane Levick, *Aetna Dropping Lawsuit*, HARTFORD COURANT, May 28, 2004, available at 2004 WLNR 19969645 ("Aetna ... abruptly moved to dismiss its own lawsuit against Abbott Laboratories two days after filing it and alleging Abbott's price increase for an AIDS medicine violated federal antitrust law. Aetna wouldn't say why it had a sudden change of heart. But sources familiar with the case say Abbott is an Aetna health plan customer and that certain high-ranking Aetna officials weren't aware that the suit had been filed.").

<sup>331</sup> See Alex Berenson, *Plaintiffs Find Payday Elusive in Vioxx Suits*, N.Y. TIMES, Aug. 21, 2007, at A1 (chronicling the history of legal and medical problems that Merck & Company have faced before and after the large pharmaceutical company withdrew Vioxx from the market in 2004).

<sup>332</sup> *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076 (N.J. 2007).

<sup>333</sup> *Id.* at 1078.

Describing themselves as “third-party payors,”<sup>334</sup> the large health insurers and other entities initiated the state law class action in a New Jersey state court rather than in federal court.<sup>335</sup> According to their complaint, Merck violated New Jersey’s Consumer Fraud Act.<sup>336</sup>

More specifically, the insurers asserted that Merck represented Vioxx as a safer and more effective alternative to other pain medications.<sup>337</sup> Therefore, from the insurers’ perspective, the large pharmaceutical company fraudulently inflated the price of Vioxx and induced all third-party payors to provide unwarranted sums of money.<sup>338</sup> The lower court certified the class that would have allowed the insurance companies and other end-payors to receive reimbursements for their expenditures.<sup>339</sup> The New Jersey Supreme Court, however, decertified the class, finding that the proposed class action was not superior to traditional legal methods of securing various remedies.<sup>340</sup>

Why is the above discussion relevant? Sixty-five years after the Supreme Court’s *South-Eastern Underwriters* decision in the mid-twentieth century, we find large groups of consumers and their supporters claiming that national and multinational insurers as well as corporations are the twenty-first century culprits who are undermining and interfering with state courts’ constitutional powers.<sup>341</sup> More precisely, opponents of comprehensive class action reforms assert that today’s corporations, insurers, and their congressional supporters are “turn[ing] 200 years of federalism on its head,” by sanctioning wholeheartedly the unwarranted removal of arguably purely substantive state law class actions from allegedly prejudiced and hostile state courts to purportedly impartial and judicious federal courts.<sup>342</sup>

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<sup>334</sup> *Id.* at 1079 (“[A] a third-party payor ... makes payments to pharmaceutical companies for prescription medications [on behalf of insured participants under] its benefit plans ....”).

<sup>335</sup> *Id.* at 1076.

<sup>336</sup> *Id.* at 1079.

<sup>337</sup> *Id.*

<sup>338</sup> *Int’l Union*, 929 A.2d 1076 at 1079.

<sup>339</sup> *See id.* at 1153–54.

<sup>340</sup> *Id.* at 1089.

<sup>341</sup> *See infra* notes 391–97 and accompanying text.

<sup>342</sup> *See* 151 CONG. REC. 2086 (2005) (statement of Sen. Hillary Clinton) (“There have been many claims about ‘judicial hellholes’ and ‘magnet jurisdictions,’ but the evidence shows that these claims are ... overstated, and are certainly not so widespread so as to justify passage of this legislation .... There is also no reasonable basis for the assertion that this legislation ‘will restore the intent of the framers’ [respecting] the role of our federal courts.”).

That insurers—as plaintiffs—have filed numerous class actions in federal and state courts is significant, because insurers—as defendants—have been unable to explain their obvious conundrum. As stated earlier, on some occasions insurers—as defendants—assert that state courts are hostile and biased against corporations generally and insurers in particular.<sup>343</sup> However, on other occasions, insurers—as plaintiffs—insist that state courts rather than federal courts are the only proper forums in which to litigate business of insurance and insurance-related disputes.<sup>344</sup>

There is more. That large national insurance companies themselves were filing massive class actions in state courts against other large corporate entities between 1998 and 2004 is highly significant. During that very period, those insurers—as defendants—as well as their insured corporate clients used their substantial political clout,<sup>345</sup> and asked Congress for a second form relief.<sup>346</sup> In particular, insurers and other national and multinational corporations encouraged Congress to enact strong legislation that would “rein in” or reduce altogether a wide spectrum of industries’ exposure to class action lawsuits in federal courts and in allegedly hostile and biased state courts.<sup>347</sup>

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<sup>343</sup> See *supra* text accompanying notes 63–67.

<sup>344</sup> See *supra* text accompanying notes 63–67.

<sup>345</sup> See David R. Francis, *Insurance Firms Fight New Bill*, CHRISTIAN SCI. MONITOR, Jun. 27, 1991, at 8 (“Because the insurance industry has so many agents, agencies, and employees scattered around the country, it has considerable political clout in Washington.”); Editorial, *A Victory for Patients*, ST. PETERSBURG TIMES, Oct. 9, 1999, at 14A (“The House Republicans’ courageous stand to join Democrats against the HMO lobby and Republican leaders puts health care reform back on the national agenda .... In a rare display of bipartisan cooperation, a surprisingly large House majority bucked the political clout of the health insurance industry and approved serious legislation to bolster the rights of patients”); Steve Weinberg, *How the Press Keeps the Lid on Itself*, ST. LOUIS POST-DISPATCH, Aug. 13, 2000, at F10 (“The failure in newsrooms to report extensively about insurance is baffling .... The failure to investigate insurance issues is a classic case of journalistic self-censorship .... The insurance industry carries lots of clout in the political realm.”).

<sup>346</sup> See, e.g., *Unfairness Incorporated: The Corporate Campaign Against Consumer Class Actions*, PUB. CITIZEN, 31 (June 2003), <http://www.citizen.org/documents/ACF2B13.pdf> (last visited Mar. 9, 2012) (“No industry has thrown more manpower into federalizing class-action lawsuits than the combined efforts of insurance companies and associations, which have devoted at least 193 lobbyists to the issue from 2000 through 2002. They have been divided among life insurance (79), property and casualty insurance (60) and HMOs (59). Some worked for more than one segment of the industry.”).

<sup>347</sup> See generally Joan Claybrook, *The Special Interests Behind “The Class Action Fairness Act,”* PUB. CITIZEN (May 20, 2004), [http://www.citizen.org/documents/Special\\_Interests\\_Behind\\_Class\\_Action\\_Bill.pdf](http://www.citizen.org/documents/Special_Interests_Behind_Class_Action_Bill.pdf) (last visited Mar. 9, 2012) (citing a 94-page Public Citizen’s report that was released in 2003 and reporting that “[a]t least 100 major

Finally, it is debatable whether insurers and corporations’ removal-of-class actions campaign was designed to turn two centuries of judicial federalism on its head. But one point is indisputable: like their mid-twentieth century counterparts, twenty-first century corporations and insurance companies’ concerted efforts to implement class action reforms were extremely successful, because Congress passed the Class Action Fairness Act of 2005.<sup>348</sup> As briefly discussed below, it is possible that CAFA will actually create significantly more perils for multinational corporations and national insurance companies, even though those corporate entities currently have the power to remove numerous state law class actions from professedly prejudiced, ineffectual, and unsympathetic state courts to allegedly fairer and more competent federal courts.

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corporations and pro-business associations ... banded together to spend millions of dollars and to employ at least 475 lobbyists from 2000 to June 2003 to make sure that class-action legislation [tilted] in their favor.” The report listed the following corporate entities and industries as the primary instigators of major class action reforms: Insurance companies and their industry associations; credit card companies, mortgage lenders and their trade associations; retail corporations; America’s largest pharmaceutical companies; the gas and oil industry; and at least two major tobacco companies); Demetri Sevastopulo, *U.S. Class-Action Lawsuits Face Reform Congress*, FIN. TIMES (London, England), Jun. 13, 2003, at 11 (“The U.S. House of Representatives was yesterday poised to approve [a bill that would move] class-action lawsuits from state to federal courts, where awards tend to be smaller. It has been widely welcomed by industry groups, which claim that class-action suits harm commerce and benefit lawyers more than their clients .... ‘It is a very encouraging step that the Senate judiciary committee has already approved a bill,’ said Joe Manero of the Alliance of American Insurers, which represents 340 insurance companies.”); Jonathan Weisman, *Lawsuit Reform a Bush Priority: President Seeks to Limit Class-Action, Malpractice Cases*, WASH. POST, Dec. 16, 2004, at A6 (reporting that “President Bush ... demanded congressional action on legislation to rein in class-action ... lawsuits”). See *infra* note 894 and accompanying text (presenting evidence of national and multinational corporations’ filing class actions against other corporations in state courts between 1998 and 2004).

<sup>348</sup> See *Industry Basks in Class-Action Victory: Congress Finally Limits Venue-Shopping, but Frivolous Suit Bill Hits Dead End*, National Underwriter, PROP. & CAS./RISK & BENEFITS MGMT. EDITION, Dec. 3, 2005, at 24 (“For eight long years, the insurance industry battled on Capitol Hill to put a lid on what they considered to be an out-of-control tort system. With Republicans firmly in control of both houses of Congress and the White House ... [i]nsurers were positively giddy when President George W. Bush signed the Class Action Fairness Act of 2005 into law. After all, the law moves a lot more cases into the more predictable federal courts ....”).

*B. Brief Overview—The Class Action Fairness Act of 2005**1. Findings and Purpose of CAFA*

To justify CAFA's enactment, the majority of Congress made an arguably highly questionable and contentious finding, which has no support in fact or in law. The finding stated in relevant part: during the decade before February 19, 2005, states' class action practices, procedures, and lawsuits eroded significantly fundamental principles of judicial federalism.<sup>349</sup> More specifically, the majority of the 109th Congress concluded that state courts' class action "abuses" had undermined "the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction" as the framers of the Constitution had intended.<sup>350</sup>

Furthermore, the congressional majority found that state courts' class action "abuses" keep "cases of national importance out of federal court,"<sup>351</sup> and allow state courts to issue biased rulings against out-of-state defendants,<sup>352</sup> allow certain state courts to impose their judgments and "view of the law" on other states,<sup>353</sup> and permit certain state tribunals to make declarations that "bind the rights" of out-of-state defendants.<sup>354</sup> Therefore, Congress enacted CAFA to restore the Framers of the Constitution's original intent—to give federal courts the sole jurisdiction to hear and decide class action "cases of national importance" between diverse citizens and persons.<sup>355</sup>

*2. The Scope of Federal Courts' Diversity Jurisdiction to Certify and Decide Class Actions of "National Importance"*

Depending on the circumstances, CAFA requires federal courts to exercise jurisdiction over certain class action lawsuits,<sup>356</sup> and it is immaterial if plaintiffs' file those actions in federal court initially, or defendants remove the actions from state to federal courts.<sup>357</sup> On the other hand, federal

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<sup>349</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 4.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> 28 U.S.C. § 1332.

<sup>356</sup> *Id.*

<sup>357</sup> See 28 U.S.C. § 1453(b) ("A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of



district courts have no authority to hear and decide those controversies if class members qualify for a local-controversy exception under several multipronged and complicated tests.<sup>358</sup> However, if a proper set of conditions present themselves, a federal court may refuse to exercise jurisdiction over class actions of “national ... interest.”<sup>359</sup>

More precisely, under CAFA, federal courts must exercise original jurisdiction over class actions in which the amount in controversy exceeds \$5,000,000.<sup>360</sup> In addition, CAFA requires only minimal diversity between class action litigants, which can be established relatively easily.<sup>361</sup> One only needs to show that: (1) at least one class member and one defendant are citizens of different states,<sup>362</sup> (2) at least one foreign class member—a state, citizen or subject—and one defendant have different citizenship,<sup>363</sup> or (3) at least one state class member and one foreign defendant—a state, citizen or subject—are among the litigants.<sup>364</sup>

But again, CAFA creates an exception that prevents federal district courts from certifying and adjudicating class actions that involve “truly local controversies.”<sup>365</sup> However, to qualify for the “local controversy exception” and keep class actions in state courts, in-state complainants must satisfy five hierarchical and nearly insurmountable tests.<sup>366</sup>

First, the “two-thirds citizenship” test requires the class representative to prove that more than two-thirds of all proposed class members are citizens of the state in which the action originated.<sup>367</sup> Next, the “significant relief” test requires class members to prove that at least one defendant is a citizen of the state in which the class action originated,<sup>368</sup> and that the defendant can provide significant relief.<sup>369</sup> The third standard—the “significant basis” test—requires complainants to prove that at least one defendant’s conduct “forms a significant basis” for class members’ claims,<sup>370</sup>

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the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.”).

<sup>358</sup> 28 U.S.C. § 1332(d)(4)(A).

<sup>359</sup> *Id.* at § 1332(d)(3).

<sup>360</sup> *Id.* at § 1332(d)(2).

<sup>361</sup> *Id.* at § 1332(d)(2)(A–C).

<sup>362</sup> *Id.* at § 1332(d)(2)(A).

<sup>363</sup> *Id.* at § 1332(d)(2)(B).

<sup>364</sup> 28 U.S.C. at § 1332(d)(2)(C).

<sup>365</sup> *Id.* at § 1332(d)(4)(A).

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at § 1332(d)(4)(A)(i)(I).

<sup>368</sup> *Id.* at § 1332(d)(4)(A)(i)(II)(cc).

<sup>369</sup> *Id.* at § 1332(d)(4)(A)(i)(II)(aa).

<sup>370</sup> 28 U.S.C. at § 1332(d)(4)(A)(i)(II)(bb).

and the “principle injuries” test requires members to prove that their “principle injuries” occurred in the state where they filed the class action initially.<sup>371</sup> Finally, to invoke the “local-controversy exception,” class members must also establish that a prior class action—asserting identical or similar allegations against any of the defendants—was not filed during the 3-year period before the “current” class action.<sup>372</sup>

Again, after considering “the totality of the circumstances” and “the interests of justice,” federal district courts may decline to exercise jurisdiction over class actions.<sup>373</sup> But before exercising that discretion, federal judges must consider a number of extremely complicated factors to prevent an abuse of judicial discretion.<sup>374</sup> Those factors appear under three headings or tests that may be described loosely as “federalism,” “numerosity,” and “commonality.” Under the first heading, district judges must determine whether plaintiffs fashioned the class action complaint to avoid federal jurisdiction,<sup>375</sup> and whether their claims concern issues of national importance or an interstate conflict.<sup>376</sup> In addition, federal courts must uncover whether the laws of the state in which the action originated or the laws of other states will govern the disposition of the class action.<sup>377</sup>

The “numerosity” test requires federal district judges to determine whether the primary defendant and one- to two-thirds of the proposed class members are citizens of the state in which the action originated.<sup>378</sup> It also mandates a determination of: (1) whether the proposed class comprises substantially larger numbers of citizens from the state in which the class action originates or larger numbers of out-of-state citizens,<sup>379</sup> and (2) whether substantial diversity in state citizenship exists among other members in the proposed class.<sup>380</sup>

Finally, federal district judges must apply a “commonality” test and assess whether the proposed class commenced the lawsuit in a forum that has “a distinct nexus with the class members, the alleged harm, or the defendants.”<sup>381</sup> Also, to avoid an abuse-of-discretion charge, the judges must determine whether plaintiffs filed at least one class action—asserting

<sup>371</sup> *Id.* at § 1332(d)(4)(A)(i)(III).

<sup>372</sup> *Id.* at § 1332(d)(4)(A)(ii).

<sup>373</sup> *Id.* at § 1332(d)(3).

<sup>374</sup> *Id.* at § 1332(d)(3)(A–F).

<sup>375</sup> *Id.* at § 1332(d)(3)(C).

<sup>376</sup> 28 U.S.C. at § 1332(d)(3)(A).

<sup>377</sup> *Id.* at § 1332(d)(3)(B).

<sup>378</sup> *Id.* at § 1332(d)(3).

<sup>379</sup> *Id.* at § 1332(d)(3)(E).

<sup>380</sup> *Id.*

<sup>381</sup> *Id.* at § 1332(d)(3)(D).

identical or similar claims on behalf of the same or similarly situated persons—anytime during the preceding three years.<sup>382</sup> And once more, depending on the judges’ findings, they may decline to exercise federal jurisdiction over the proposed class action.<sup>383</sup>

#### IV. CLASS ACTION REMOVALS FROM ALLEGEDLY “BIASED” STATE COURTS TO FEDERAL COURTS—ARGUABLY NEWLY CREATED PERILS UNDER CAFA FOR CORPORATIONS AND INSURERS AS PLAINTIFFS AND DEFENDANTS

During the House and Senate’s debates on whether to enact CAFA’s potentially “radical” class action reforms, members on both sides of the political divide cited numerous reasons to embrace or reject the proposed legislation.<sup>384</sup> Among those supporting the legislation, class action reformers stressed that CAFA would strengthen fundamental principles of judicial federalism.<sup>385</sup> How? The proponents asserted: (1) CAFA would allow corporate defendants to remove “copycat”<sup>386</sup> and very large “national”

<sup>382</sup> 28 U.S.C. at § 1332(d)(3)(F).

<sup>383</sup> *Id.* at § 1332(d)(3).

<sup>384</sup> Depending on a congressional member’s political leanings or biases, the following reasons were listed frequently as the “true” justifications for CAFA’s enactment: 151 CONG. REC. 2653 (2005) (statement of Rep. Joe Baca) (“[This Act is] going to significantly harm small consumers who want to hold large companies accountable for defrauding them.”); *id.* at 2645 (statement of Rep. Linda Sanchez) (“[T]his bill really is about .... doing a favor for unscrupulous, negligent corporations by making it harder for their victims to sue them.”); *id.* at 2086 (statement of Sen. Hillary Clinton) (“[Regarding CAFA’s purported goal to assure] ‘fair and prompt recoveries’ hundreds of consumer rights, labor, civil rights, senior, and environmental organizations, esteemed legal experts, and many State Attorneys General believe as I do that this legislation will do just the opposite.”); *id.* at 2072 (statement of Sen. David Vitter) (“[O]ur class action system is rife with abuses. It is gamed. It is broken. We need to fix it .... [W]e need to fix it for the consumers who are hurt by alleged abuses.”); *id.* at 1670 (statement of Sen. Sam Brownback) (“[M]oving more class actions to federal court would actually reduce the burden for everyone. Ultimately, this bill will allow claims with merit to go forward while preventing judicial blackmail.”); *id.* at 1664 (statement of Sen. Grassley) (“We heard about class action lawyers entering into collusive settlements with defendant attorneys which were not in the best interest of class members. These are only a few of the gamesmanship tactics lawyers like to utilize to bring down the entire class action legal system.”); *id.* at 1650 (statement of Sen. Orrin Hatch) (“This bill is [fashioned] to ... stop the forum shopping, [a practice of] finding jurisdictions that will render outrageous verdicts that basically benefit the attorneys [rather than] the people for whom they are suing.”).

<sup>385</sup> See *infra* notes 386–90.

<sup>386</sup> See 151 CONG. REC. 2645 (statement of Rep. Christopher Cannon) (“[W]e need to understand the game the class action lawyers play ... and how they [abuse] the court systems. I call it Class Action Monopoly .... Rule 23 is the rule that would apply in Fed-

class actions to federal courts—the allegedly intended and proper forums for litigating such lawsuits,<sup>387</sup> (2) CAFA’s liberal removal provision will help to foster a more efficient form of judicial federalism,<sup>388</sup> (3) the new statute would prevent supposedly biased state court judges—in “magic jurisdictions”<sup>389</sup>—from employing unprincipled procedures to decrease corporate defendants’ likelihoods of winning, and, (4) the new law would prevent class members from undermining federalism by taking away their “home-court” advantage in state courts.<sup>390</sup>

Generally, opponents of class action reforms argued that CAFA “[would turn] 200 years of federalism on its head.”<sup>391</sup> More explicitly, they insisted that CAFA would severely undermine judicial federalism by: (1) blocking or limiting state courts’ right<sup>392</sup> and competence to enforce

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eral courts that defines when a class action can be certified consistent with fundamental fairness and due process considerations. But in this game, there is no fairness. There is no due process. So they easily convince their magnet State to certify ... a class and at the same time they file copycat lawsuits in State courts all over the country. These are the same class actions asserting the same claims on behalf of the same people. These copycat lawsuits clog the State courts.”).

<sup>387</sup> See *id.* at 2074 (statement of Sen. Orrin Hatch).

<sup>388</sup> See *id.* at 2092 (statement of Sen. Christopher Dodd) (“[C]urrent pleading practice by the class action plaintiffs bar has very effectively denied Federal jurisdiction over cases that are predominantly interstate in nature. These are precisely the kinds of cases the Framers thought deserve to be heard in Federal courts .... [This Act only brings] pleading practice more into line with constitutional requirements. Cases that are primarily intrastate rather than interstate in nature may continue to be heard in State courts. But ... clearly interstate [cases] will now be more likely to be heard in Federal court, where they belong.”).

<sup>389</sup> See *id.* at 1828 (statement of Sen. Orrin Hatch, quoting Plaintiffs’ Attorney Richard Scruggs) (“[In] ‘Magic Jurisdictions,’ trial lawyers have established relationships with [elected, populists] ... State court judges .... [Given that political force], it’s almost impossible to get a fair trial if you’re a defendant in some of these places.”).

<sup>390</sup> See, e.g., *id.* at 2084 (statement of Sen. Mike Enzi) (“The class action system in our country is broken .... The U.S. Constitution gives jurisdiction to the Federal Government when cases involve citizens of differing states. It makes sense ... that no party [should have] the inevitable ‘home-court’ advantage ... when a case is tried in [one’s] backyard.”).

<sup>391</sup> See *id.* at 2086 (statement of Sen. Hillary Clinton) (“There have been many claims about ‘judicial hellholes’ and ‘magnet jurisdictions,’ but the evidence shows that these claims are ... overstated, and are certainly not so widespread so as to justify passage of this legislation .... There is also no reasonable basis for the assertion that this legislation ‘will restore the intent of the framers’ [respecting] the role of our federal courts.”).

<sup>392</sup> 151 CONG. REC. 1647 (statement of Sen. Ted Kennedy) (“When States act ahead of the Federal Government to provide greater rights for their citizens, State courts should be allowed to interpret their own laws. State courts, not Federal courts, have the expertise in exerting the will of the State legislature and they should have the right to do so. ... We should call this bill the ‘Class Action Hypocrisy Act of 2005.’ Our colleagues love to

state and local laws,<sup>393</sup> (2) allowing federal laws to preempt additional state court procedures and rulings,<sup>394</sup> (3) reducing aggrieved citizens’ constitutional right to secure remedies in both state and federal courts,<sup>395</sup> (4) clogging federal courts with substantially more class actions—which will reduce speedy trials and the effective administration of justice,<sup>396</sup> and (5) allowing an out-of-state or a foreign corporate defendant to move a truly local, massive class action “into [a federal court] even if all ... underlying facts in the case happened in a single state.”<sup>397</sup>

In light of the pre-CAFA federalism debate, this Part presents an analysis of whether CAFA’s newly minted procedural requirements are more likely to restore, support or undermine fundamental principles of judicial federalism. Furthermore, as reported above, CAFA created many new tests.<sup>398</sup> It leaves, however, the burden of defining and explaining the parameters of those tests for federal courts of appeals or for various panels within those circuits. Therefore, a discussion of some newly generated substantive questions and conflicts—involving the *Erie* doctrine, choice of

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proclaim States rights when Congress tries to expand the rights of law in all 50 States, but they do not hesitate to override States rights to help their business friends. This bill is a windfall for guilty corporate offenders.”).

<sup>393</sup> See *id.* at 2086 (statement of Sen. Hillary Clinton, quoting Arthur Miller) (“[The Act is] a radical departure from one of the most basic, longstanding principles of federalism [and] is a particular affront to state judges when we consider the unquestioned vitality and competence of state courts to which we have historically and frequently entrusted the enforcement of state-created rights and remedies”).

<sup>394</sup> See *id.* at 2082 (statement of Sen. Dick Durbin) (“I would hate to see this bill—which already turns the idea of federalism on its head—preempt any more State rules and procedures than it already does with the diversity provisions.”).

<sup>395</sup> See *id.* at 2647 (statement of Rep. Jay Inslee) (“[Presently, there are] two arms to protect Americans, the State judicial system and the Federal judicial system. This [bill] reduces by half the resources that are available to Americans to get redress when Enron steals from them or when Vioxx kills them.... [I]n our system of federalism, Americans deserve the full protection, not just half the protection. This [bill] cuts the available judicial resources in half.”).

<sup>396</sup> See *id.* at 2646 (statement of Rep. Melvin Watt) (“[H]aving practiced law for over 20 years, [I’m certain] the core provisions of this bill will invite prolonged satellite litigation into ill-defined or undefined terms in this bill, clogging the Federal courts and denying prompt justice to worthy claimants.”); *id.* at 1657 (statement of Sen. Russell Feingold) (“Criminal cases ... take precedence in the federal courts, because of the Speedy Trial Act. So if you look at this [Act] in ... context, the net result of removing virtually all class actions, civil cases, of course, to federal court will be to delay those cases.”).

<sup>397</sup> 151 CONG. REC. at 1646 (statement of Sen. Ted Kennedy).

<sup>398</sup> 28 U.S.C. § 1332(d)(4)(A) (2006).

law rules, and the applicability of the McCarran-Ferguson Act—appear here as well.

*A. Allegedly “Biased” State Courts, Class Action Removals Under CAFA and the Erie Doctrine—Arguably a Catch-22 for Corporations and Insurers Who Are Plaintiffs in Federal Courts*

Writing for the majority in *Price Waterhouse v. Hopkins*,<sup>399</sup> Associate Justice Brennan used Catch-22—a widely used idiom—to describe persons who found themselves in a “no-win situation” or in a “double bind.”<sup>400</sup> He wrote: “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: [Women are] out of a job if they behave aggressively and [they are] out of a job if they do not. Title VII [of the Civil Rights Act] lifts women out of this bind.”<sup>401</sup> On another occasion, then Associate Justice Rehnquist used the idiom to illustrate the majority’s arguably absurd holding in *Aguilar v. Felton*.<sup>402</sup> He wrote: “[Today,] the Court takes advantage of the ‘Catch-22’ paradox of its own creation.... [It declares that] aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement. The Court ... strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low-income families. [However, the] Establishment Clause does not prohibit such sorely needed assistance ....”<sup>403</sup>

CAFA creates a Catch-22 for a proposed class of complainants in a diversity lawsuit. Consider the evidence and settled law. Rule 23(a) of the Federal Rules of Civil Procedure permits a federal district court to certify a class action.<sup>404</sup> To achieve that end, the district court must determine whether a certification would satisfy four requirements under Rule 23(a)—numerosity, commonality, typicality, and representativeness.<sup>405</sup> In

<sup>399</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>400</sup> *See id.* at 251.

<sup>401</sup> *Id.*

<sup>402</sup> *Aguilar v. Felton*, 473 U.S. 402, 420–21 (1985) (Rehnquist, J., dissenting).

<sup>403</sup> *See id.*; *see also* *Wallace v. Jaffree*, 472 U.S. 38, 109 (1985) (Rehnquist, J., dissenting) (“Interferences with religion should arguably be dealt with under the Free Exercise Clause .... [However, we] have not always followed *Walz*’s reflective inquiry into entanglement. ... One of the difficulties with the entanglement prong is that, when divorced from the logic of *Walz*, it creates an ‘insoluble paradox’ in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement.”).

<sup>404</sup> FED. R. CIV. P. 23(a).

<sup>405</sup> *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005).



addition, if the proposed class wants damages, Rule 23(b)(3) requires the district court to determine whether the class representative has satisfied the predominance and superiority requirements.<sup>406</sup> Again, the predominance element requires a court to find that common issues of law or fact “predominate over any questions affecting only individual members.”<sup>407</sup>

In *Klaxon Co. v. Stentor Electric Manufacturing Co.*, the Supreme Court declared that when a federal district court exercises diversity or supplemental jurisdiction over a controversy, the *Erie* doctrine<sup>408</sup> requires that court to apply the choice of law rules of the state in which it sits.<sup>409</sup> In light of *Klaxon*’s ruling, federal district courts have grappled with the predominance requirement for at least thirty-five years.<sup>410</sup> The reason for this is not complex. Fairly often, a Rule 23(b)(3) class action includes extremely large numbers of complainants who reside in every state.<sup>411</sup> Consequently, as the variability among proposed class members’ domiciliary states increases, variances among those states’ laws also increases.<sup>412</sup>

Under our system of federalism, each state wants its citizens to be treated fairly and receive adequate damages in a federal diversity trial. Thus, to address each class member’s individual claims and causes of action, a federal district court must perform a thorough choice of law analysis.<sup>413</sup> In the process the district judge might feel compelled to apply the laws of fifty states and the District of Columbia, a conclusion that certainly conflicts with *Klaxon*.<sup>414</sup> At that point the court could deny class

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<sup>406</sup> See *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527 (3d Cir. 2004).

<sup>407</sup> *Id.* at 52.

<sup>408</sup> See *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992) (“[I]t is the duty of the federal court to determine as best it can, what the highest court of the state would decide.”).

<sup>409</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that the federal court sitting in Delaware must apply conflict of law rules in conformity with those applied in Delaware state courts).

<sup>410</sup> See *Alameda Oil Co. v. Ideal Basic Indus., Inc.*, 326 F. Supp. 98, 104 (D.C. Colo. 1971) (certifying a class after determining that common issues were predominant).

<sup>411</sup> See, e.g., *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007) (accepting the district court’s finding that the laws of all fifty-one jurisdictions applied to the class action); *Marino v. Home Depot U.S.A., Inc.*, 245 F.R.D. 729, 734 (S.D. Fla. 2007) (certifying a class that would involve a breach-of-contract claim for all fifty states).

<sup>412</sup> See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995).

<sup>413</sup> *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006).

<sup>414</sup> See *Klaxon*, 313 U.S. at 496 (stating that a state has the right to pursue local policies that the federal courts cannot thwart by enforcing other general laws).

certification,<sup>415</sup> concluding that the variations among states' laws "swamp any common issues and defeat predominance."<sup>416</sup>

In view of the *Erie-Klaxon* requirements, choice of law problems generally, and the predominance requirement in particular, CAFA creates an indefensible Catch-22 for persons who ask federal courts to certify a Rule 23(b)(3) class action.<sup>417</sup> The paradox is this: a stated purpose of CAFA is to ensure that class actions of national importance are certified and litigated in federal courts,<sup>418</sup> given state courts' alleged incompetency and the wide variances among state laws.<sup>419</sup> But federal courts may not certify class actions of national importance given the predominance requirement and wide variances among state laws.<sup>420</sup>

Undeniably, during the Senate and House's debates CAFA's supporters and opponents were very cognizant of federal district courts' immense propensity to deny Rule 23(b)(3) certification motions when wide variances appear in the proposed class members' state laws.<sup>421</sup> To correct that perceived injustice, Senators Feinstein and Bingaman offered an amendment.<sup>422</sup> It read in the pertinent part, "the district judge shall not deny class certification, in whole or in part, on the ground that the law of more than one State will be applied."<sup>423</sup> The Senate majority, however, rejected the Feinstein-Bingaman amendment.<sup>424</sup>

Essentially, the majority of CAFA's supporters concluded that adopting the amendment would undermine fundamental principles of federalism

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<sup>415</sup> See, e.g., *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527 (3d Cir. 2004) ("Appellants argue that the Rule 23(a) commonality and Rule 23(b)(3) predominance requirements were not satisfied in this case because of variations in the claims and injuries of the plaintiffs ... as well as differences in the laws of the 50 states which form the basis of several of the class' claims.").

<sup>416</sup> See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (citing *Georgine v. Amchem Prods.*, 83 F.3d 610, 618 (3d Cir. 1996)).

<sup>417</sup> Compare *id.* (stating that a court must consider the variations in state law across multiple jurisdictions when considering class certifications), with Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 5 (establishing that CAFA's intent is to ensure interstate cases of national importance are considered under diversity jurisdiction).

<sup>418</sup> Class Action Fairness Act of 2005 119 Stat. at 5.

<sup>419</sup> See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

<sup>420</sup> See *Castano*, 84 F.3d at 752.

<sup>421</sup> See, e.g., 151 CONG. REC. 2083 (2005) (statement of Sen. Carl Levin); *id.* at 2657 (statement of Rep. F. James Sensenbrenner).

<sup>422</sup> See *id.* at 1832 (statement of Sen. Dianne Feinstein) (offering an amendment to address federal judges' ability to deny class certifications due to immense variance across state law).

<sup>423</sup> *Id.* at 1814.

<sup>424</sup> *Id.* at 1832.

because it would have allowed federal courts to apply a single state’s law in a nationwide class action.<sup>425</sup> But was CAFA’s supporters’ concern justified? Arguably it was not, serving only as a specious reason to reject the Feinstein-Bingaman amendment.<sup>426</sup> If CAFA’s supporters had carefully reviewed the Supreme Court’s choice of law ruling in *Phillips Petroleum Co. v. Shutts*,<sup>427</sup> they would have discovered that the Feinstein-Bingaman amendment simply embraced that ruling.<sup>428</sup>

In *Shutts* at least 28,000 aggrieved royalty owners filed a class action against Phillips Petroleum to secure interest payments on the owners’ suspended royalties.<sup>429</sup> Although the complainants resided “in all 50 States, the District of Columbia, and several foreign countries,” the class representatives filed the nationwide class action in a Kansas state court.<sup>430</sup> The judge certified the class and ruled in favor of the class on the merits.<sup>431</sup> The Kansas Supreme Court affirmed the decision,<sup>432</sup> concluding that “the law of the forum control[s] all claims unless ‘compelling reasons’ existed to apply a different law.”<sup>433</sup> Failing to find a compelling reason to apply the substantive law of another state, the Kansas Supreme Court concluded that the entire cause of action had to proceed under Kansas’s class action statute.<sup>434</sup> Phillips petitioned the Supreme Court for review.<sup>435</sup>

Before the Court, Phillips argued that “Kansas courts could not apply Kansas law to every claim in the dispute.”<sup>436</sup> According to the company, “total application of Kansas substantive law violated the constitutional limitations on choice of law mandated by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, § 1.”<sup>437</sup> Phillips also stressed that Kansas’s trial court “should have looked to the laws of each State where the leases were located to determine ...

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<sup>425</sup> See *id.* at 1820 (Letter submitted by Mr. Walter E. Dellinger of O’Melveny & Myers, LLP).

<sup>426</sup> See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 822–23 (1985) (providing support for the amendment’s goals in its conclusion that the application of Kansas law to every claim was arbitrary and unfair to substantive conflicts with other applicable jurisdictions).

<sup>427</sup> *Id.* at 823.

<sup>428</sup> See *id.* at 822–23 (concluding that applying Kansas law to every claim was arbitrary and unfair due to substantive conflicts with the law of other jurisdictions).

<sup>429</sup> *Id.* at 799.

<sup>430</sup> *Id.* at 803.

<sup>431</sup> *Id.*

<sup>432</sup> *Shutts*, 472 U.S. at 799.

<sup>433</sup> *Id.* at 803.

<sup>434</sup> See *id.*

<sup>435</sup> *Id.* at 799.

<sup>436</sup> *Id.* at 802.

<sup>437</sup> *Id.* at 816.

whether interest on the suspended royalties was recoverable, and at what rate.”<sup>438</sup>

To determine whether Kansas’s court exceeded constitutional, choice-of-substantive-law limits, the *Shutts* Court applied a two-part test. First, a court must find that “common issues of law or fact” predominate among class members before certifying a class action.<sup>439</sup> Second, a state “must have a significant contact or significant aggregation of contacts, [with class members] creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”<sup>440</sup> In the end, the Supreme Court concluded that the courts in Kansas failed to satisfy the second element.<sup>441</sup>

Before the enactment of CAFA, the significant-contact, choice of law principle in *Shutts* was clear: when adjudicating a nationwide class action, “a state court may be free to apply one of several choices of law,” as long as there are significant contacts and the choice of law is not arbitrary or fundamentally unfair.<sup>442</sup> Simply put, the pre-CAFA Feinstein-Bingaman amendment would have codified *Shutts*’s choice of law ruling and instructed federal district courts to apply that rule and certify a class action even if multiple states’ laws were applicable in a certain controversy.<sup>443</sup>

So, what would be an unintended adverse consequence for corporations as plaintiffs in class actions? Like complaining consumers, multinational corporations and insurance companies may also file class actions, often citing numerous violations and claims under various state laws. In light of Rule 23(c)(4)’s predominance requirement and Congress’s refusal to insert the Feinstein-Bingaman language into CAFA, disgruntled corporate entities will also probably have more difficulty certifying their classes. At this point, one congressman’s insightful observation and conclusions in speaking against CAFA are worth repeating:

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<sup>438</sup> *Shutts*, 472 U.S. at 802–03.

<sup>439</sup> *Id.* at 821.

<sup>440</sup> *Id.* at 818 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

<sup>441</sup> *See id.* at 822 (citing *Pac. Emps. Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 502 (1939); *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)).

<sup>442</sup> *See id.* at 823 (stating that the state court is free to apply a choice of law as long as the requirements of *Allstate* and *Home Insurance Co.* are met).

<sup>443</sup> *See* 151 CONG. REC. 1813 (2005).

Do you want to know why the Chamber of Commerce is spending \$1 billion to lobby on what seems to be a procedural issue? Because they throw out class actions where there is any difference in States[’ substantive laws], meaning you will not be able to have a class action anywhere, anywhere, Federal or State.<sup>444</sup>

Arguably, this conclusion applies to corporate complainants who commence class actions against corporations generally and insurance companies in particular.<sup>445</sup>

*B. CAFA’s “Minimal Diversity” and “Cases of National Importance”  
Rules—“Trojan Horses” for Insurers as Defendants in Federal Courts?*

Once more, it is important to distinguish national insurance companies as plaintiffs from national insurers as defendants in class actions as well as in other consumer-initiated lawsuits. As corporate defendants, national insurers face a conundrum—determining whether federal or state courts should have greater power to “regulate” insurers’ business practices generally or to hear and decide consumers’ insurance-related claims and causes in particular. As discussed in Part III.A, insurers as defendants have campaigned long and aggressively to ensure that state courts rather than federal courts hear and resolve most “business of insurance” disputes as well as consumers’ complaints against insurers.<sup>446</sup> In fact, by embracing a

<sup>444</sup> *Id.* at 2647 (statements of Rep. Jay Inslee); *see also id.* at H742 (statements of Rep. William Delahunt) (“[W]e have before us a bill that would sweep aside generations of State laws that protect consumers. Citizens will be denied their basic right to use their own State courts to file class action lawsuits against companies.”). *But see* *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (“[S]uperiority requirements in Rule 23(b)(3) do not foreclose the possibility of mass tort class actions, but merely ensure that class certification in such cases ‘achieve economies of time, effort, and expense, and promote ... uniformity of decision ... without sacrificing procedural fairness or bringing about other undesirable results.’” (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997))). It is worth stressing, however, that federal courts have “relaxed” the predominance requirement when class representatives’ federal-statutory rather than state law claims formed the basis of the class action complaints. *See, e.g.*, *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 244 F.R.D. 469, 480 (N.D. Ill. 2007) (finding predominance, certifying a class, and allowing the action to proceed under the Commodity Exchange Act, 7 U.S.C. § 25(a)(1)(D)); *New England Carpenters Health Benefits Fund v. First Databank Inc.*, 244 F.R.D. 79, 89 (D. Mass. 2007) (finding predominance, certifying a class, and allowing the action to proceed under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c)).

<sup>445</sup> *See, e.g.*, *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 225 F.R.D. 208, 210 (S.D. Ohio 2003) (deciding class certification for corporate complainant attempting class action against corporation).

<sup>446</sup> *See supra* notes 279–94 and accompanying text.

states' rights argument and insisting that state courts are more likely to issue fairer and more favorable equitable rulings, insurers as defendants have a rich history of removing, or trying to remove, declaratory judgment and subrogation actions from federal courts to state courts.<sup>447</sup>

Yet, insurers as defendants lobbied passionately for CAFA's enactment and embrace wholeheartedly that statute's class action reforms that allow insurers-defendants to remove large blocks of class actions and, indirectly, business of insurance controversies from state courts to federal courts.<sup>448</sup> So it is worth asking why insurers as defendants would endorse CAFA's removal rule in one instance, and, in another instance, campaign to keep business of insurance and insurance-related lawsuits in state courts. Apparently, when it is fitting, multinational insurers will argue that federal courts are "highly principled," "unbiased," and exceedingly more competent to hear and decide business of insurance and class action lawsuits.<sup>449</sup> On other occasions, when procedural and substantive hurdles are perceived as being too onerous in federal courts, insurers as defendants are likely to embrace a contradictory position and assert that only state courts should have the sole authority to hear and decide insurance-related controversies.<sup>450</sup>

However, in light of CAFA's questionable findings, one may assume that federal courts are indeed significantly less likely to be biased against multinational insurers who are defendants in class actions. Still, insurers-defendants as well as plaintiffs' lawyers and defense counsels should ask whether CAFA's newly enacted reforms contain any hidden procedural perils for insurers who decide to remove class actions from allegedly biased and unsympathetic state courts to professedly impartial and more proficient federal courts. Without a doubt, the legal literature and federal

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<sup>447</sup> See, e.g., *Certain Underwriters at Lloyd's London v. ABB Lummus Global, Inc.*, 2004 WL 224505, at \*1 (S.D.N.Y. Feb. 5, 2004) (petitioning district court to remove the action to a New York state court to declare whether the underwriters had a contractual obligation to indemnify their insured's for settling third-party claims); *La. Farm Bureau Cas. Ins. Co. v. Michelin Tire Corp.*, 207 F. Supp. 2d 524, 526–27 (M.D. La. 2002) (granting insurer's request to remand the subrogation action to state court because the removal to federal court was untimely); see also *Lexington Ins. Co. v. Daybreak Express, Inc.*, 391 F. Supp. 2d 538, 539 (S.D. Tex. 2005) (describing insurers' petitioning to remove the controversy to state court given the district court's lack of subject-matter jurisdiction).

<sup>448</sup> See Claybrook, *supra* note 347 (stating that the insurance industry provided significant support to CAFA due to the industry's tendency to federalize class action lawsuits).

<sup>449</sup> See *infra* notes 491–97 and accompanying text.

<sup>450</sup> See *Certain Underwriters*, 2004 WL 224505, at \*3.



cases are replete with examples of modern-day “Trojan horses”<sup>451</sup>—newly enacted statutes which contain unanticipated and effective stratagems or weapons for one’s legal adversaries.<sup>452</sup> CAFA embraces the “minimal diversity rule”<sup>453</sup> and allows “cases of national importance” to be removed from state to federal courts.<sup>454</sup> Even more importantly, the insurance industry lobbied effectively for those two provisions to help increase corporate defendants’ likelihood of litigating and winning most class actions in federal courts.<sup>455</sup>

However, as discussed below, CAFA’s procedural hurdles, the minimal diversity and cases of national importance rules, are likely to become “Trojan horses” for defendant insurance companies.<sup>456</sup> Put simply, classes of aggrieved consumers may cite those rules and force reticent corporate defendants to litigate ancillary state law controversies in federal courts rather than in state courts. But even more importantly, CAFA’s “cases of national importance” rule is likely to enhance federal courts’ ability to accomplish what the Supreme Court’s decision in *South-Eastern Underwriters Association* could not accomplish and undo what the McCarran-Ferguson Act has tried to prevent.<sup>457</sup> Debatably, CAFA’s “cases of national importance” provision gives federal courts greater powers to regulate more extensively the “business of insurance” generally, as well as the business affairs and conduct of individual insurers in particular.<sup>458</sup>

*1. Class Action Lawsuits, CAFA’s “Minimal Diversity Rule” and Potential Unintended Consequences for Corporate Defendants*

How might CAFA’s “minimal diversity rule” adversely affect insurers as defendants? More than a century ago, the Supreme Court decided *Strawbridge v. Curtiss* and restricted inferior federal courts from exercis-

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<sup>451</sup> A search of Westlaw’s JLR database using the query ti(“Trojan horse”) generated fifty-one articles (last visited Mar. 9, 2012).

<sup>452</sup> See Ian D. Prior & Lisa Skehill, *Beware the Federal Government Bearing Gifts: How the American Recovery and Reinvestment Act of 2009 Could Become a Whistleblowing Trojan Horse*, 43 SUFFOLK U. L. REV. 565, 565–66 (2010) (discussing how the statute’s Trojan horse properties stem from an apparent windfall for plaintiff attorney’s while containing the many hidden downfalls).

<sup>453</sup> See *infra* notes 459–90 and accompanying text.

<sup>454</sup> See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 5.

<sup>455</sup> See Claybrook, *supra* note 347 (stating that the insurance industry provided significant support to CAFA due to the Act’s various provisions that would send more suits to federal court).

<sup>456</sup> See discussion *infra* Parts IV.B.1–B.2.

<sup>457</sup> See discussion *infra* Part IV.B.2.

<sup>458</sup> See discussion *infra* Part IV.B.2.

ing jurisdiction over certain legal controversies.<sup>459</sup> More specifically, the Court fashioned the “complete diversity” rule and declared that federal district courts may have original jurisdiction over diversity cases only if the aggregate of plaintiffs and the aggregate of defendants were citizens of different states.<sup>460</sup> In 1967, the Court decided *State Farm Fire & Casualty Co. v. Tashire*, explaining its decision in *Strawbridge* and declaring that the “complete diversity” rule is a statutory rather than a constitutional requirement.<sup>461</sup>

The *Tashire* Court also held that Article III of the Constitution allows federal courts to decide diversity cases when one establishes only “minimal” diversity—a standard requiring a movant to prove that at least one plaintiff and one defendant are citizens of different states.<sup>462</sup> Two years later, the Supreme Court decided *Snyder v. Harris* and reduced the movant’s burden even further.<sup>463</sup> In *Harris* the Court held that federal district courts may exercise subject-matter jurisdiction over class actions by determining only the citizenship of the plaintiffs named in the complaint.<sup>464</sup>

CAFA adopts the minimal diversity rule.<sup>465</sup> Therefore, looking prospectively, insurers as defendants—on behalf of themselves and their insured corporate entities—will possibly have less difficulty removing allegedly “frivolous” state law class actions from purportedly hostile state courts to federal courts.<sup>466</sup> It is also important to stress that on numerous occasions before class action reforms, insurers as defendants praised state court judges and fought vigorously to remove “business of insurance” as well as state law class actions from federal to state courts, insisting emphatically that federal courts did not have jurisdiction.<sup>467</sup>

The next point, however, is even more important. Before CAFA, some insurers-defendants argued in federal courts that complete diversity was

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<sup>459</sup> See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267–68 (1806) (stating that where there is a joint interest, each individual concerned in that interest must be liable to sue or be sued in that court).

<sup>460</sup> *Id.*

<sup>461</sup> *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967).

<sup>462</sup> See *id.* at 531.

<sup>463</sup> See *Snyder v. Harris*, 394 U.S. 332, 340 (1969).

<sup>464</sup> *Id.*

<sup>465</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 9.

<sup>466</sup> See *Harris*, 394 U.S. at 340 (permitting a showing of diversity of citizenship when any one member of a class of plaintiffs and any one member of a class of defendants are citizens of different states).

<sup>467</sup> See *supra* note 450.

absent between themselves and their insured customers.<sup>468</sup> Thus, according to the insurers, federal district court judges had a constitutional duty to remove the insurance litigation from federal to state courts, since most of the consumers and insurers were citizens of the same state.<sup>469</sup> To illustrate, consider a few pertinent facts in *Schlumberger Industries, Inc. v. National Surety Corp.*<sup>470</sup> Schlumberger and its predecessor in interest purchased comprehensive general liability (CGL) insurance contracts from numerous insurance companies.<sup>471</sup> In the course of events Schlumberger released hazardous substances contaminating the soil and water at certain sites in South Carolina.<sup>472</sup> State and federal environmental-protection agencies ordered Schlumberger to decontaminate the areas.<sup>473</sup>

After Schlumberger complied, its two liability insurers, National Surety Corporation and American Insurance Company, commenced a declaratory judgment action in a federal district court in South Carolina.<sup>474</sup> The insurers asked the district court to determine their rights and responsibilities under the CGL insurance contracts (*Anderson* suit).<sup>475</sup> Schlumberger filed a similar declaratory judgment suit in a South Carolina court in Greenville County (*Greenville* suit) about a month after the two insurers filed the *Anderson* suit.<sup>476</sup> The *Greenville* complaint listed numerous insurers, including National and American, as defendants and petitioned the state court to determine whether each CGL insurer had a contractual duty to reimburse Schlumberger's expenditures for decontaminating the polluted sites.<sup>477</sup>

After some complicated procedural maneuvers, the cases were consolidated in the federal district court.<sup>478</sup> The insurance companies moved to dismiss and remand the *Greenville* suit to state court,<sup>479</sup> insisting that complete diversity among the *Greenville* litigants was absent.<sup>480</sup> The dis-

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<sup>468</sup> See, e.g., *Schlumberger Indus., Inc. v. Nat'l Surety Corp.*, 36 F.3d 1274, 1277 (4th Cir. 1994).

<sup>469</sup> See *id.* at 1284 (mentioning insurers' assertion that the insured argue in favor of jurisdictional manipulation and overrode interests of domestic insurers to remain in federal court).

<sup>470</sup> *Id.* at 1274–75.

<sup>471</sup> *Id.* at 1277.

<sup>472</sup> *Id.* at 1276–77.

<sup>473</sup> *Id.* at 1277.

<sup>474</sup> *Schlumberger*, 36 F.3d at 1277.

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

<sup>478</sup> *Id.* at 1277–78.

<sup>479</sup> See *id.* at 1277.

<sup>480</sup> *Schlumberger*, 36 F.3d at 1277.

strict court refused to remand the *Greenville* suit.<sup>481</sup> On appeal, the Fourth Circuit reversed the lower court's ruling.<sup>482</sup>

The Fourth Circuit reiterated that "removal jurisdiction raises significant federalism concerns."<sup>483</sup> Citing *Strawbridge* and 28 U.S.C. § 1332(a)(1), the Court of Appeals stressed that federal courts may not exercise diversity jurisdiction unless the plaintiff establishes complete diversity among the parties.<sup>484</sup> Ultimately, the Fourth Circuit found "only minimal diversity" after the federal district court dismissed a key insurer from the *Greenville* suit.<sup>485</sup> Therefore, the appellate court remanded the case to the state court, declaring that the federal district court did not have jurisdiction over the *Greenville* suit.<sup>486</sup>

Again, satisfying corporate defendants' wishes, CAFA clearly embraces the "minimal diversity" rather than "complete diversity" rule.<sup>487</sup> But note: in *Schlumberger*, the insurers as defendants unmistakably did not want the federal district court judge to decide the case.<sup>488</sup> However, in a post-CAFA era, disgruntled consumers, like the insured-company-consumer in *Schlumberger*, may prefer to litigate mixed federal and state law class actions in federal courts rather than in state courts. Before CAFA, such an effort would have been thwarted if the consumers did not satisfy *Strawbridge*'s "complete diversity" rule.<sup>489</sup> Arguably, in a post-CAFA era, the minimal diversity rule will allow corporate defendants as well as allegedly injured consumers to remove certain state law class actions to federal courts, even if the aggregates of aggrieved consumers and corporate defendants are not completely diverse.<sup>490</sup>

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<sup>481</sup> *Id.*

<sup>482</sup> *Id.* at 1288.

<sup>483</sup> *Id.* at 1284 ("[W]here federal [removal] jurisdiction is doubtful, a remand is necessary." (quoting *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994))).

<sup>484</sup> *See id.* (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)).

<sup>485</sup> *Id.*

<sup>486</sup> *Schlumberger*, 36 F.3d at 1284.

<sup>487</sup> *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 5.

<sup>488</sup> *See Schlumberger*, 36 F.3d at 1284 (mentioning insurers' assertion that the insured argue in favor of jurisdictional manipulation and overrode interests of domestic insurers to remain in federal court).

<sup>489</sup> *See Strawbridge*, 7 U.S. (3 Cranch) at 267-68.

<sup>490</sup> *See, e.g.,* Robert Pear, *Class-Action Bill Favorable to Business Passes House*, N.Y. TIMES, Mar. 14, 2002, at A5 ("[CAFA] give[s] federal courts jurisdiction over any class action lawsuit with claims totaling more than \$2 million if at least one plaintiff and one defendant were from different states.").

2. *CAFA’s “Cases of National Importance” Rule and Some Potential Unintended Consequences for Insurers as Defendants in Class Actions*

To reiterate, a major purpose of CAFA is to restore the framers’ intent by allowing federal rather than state courts to hear and decide “interstate cases of national importance.”<sup>491</sup> According to class action reformers, plaintiffs’ lawyers often abuse class action procedures by filing “nation-wide class actions” in state courts that have a history of favoring plaintiffs.<sup>492</sup> Therefore, as reported earlier, CAFA makes it easier for corporate defendants to remove such actions “from state courts to federal courts, where rules of evidence and procedure are often viewed as more favorable to defendants.”<sup>493</sup>

Possibly the “cases of national importance” rule will present unintended risks and complications for insurers.<sup>494</sup> Again, in *South-Eastern Underwriters Association*, the Supreme Courts gave federal courts expansive powers to regulate the “business of insurance” under the Commerce Clause and, by implication, the business activities of insurance companies,<sup>495</sup> but large insurance conglomerates vigorously attacked the Court’s allegedly “hostile” decision in that monumental case.<sup>496</sup> However, as of this writing and in the wake of CAFA, large insurance conglomerates are celebrating their statutory right to remove so-called “cases of national importance” from supposedly unprincipled, unfriendly, and biased state courts.<sup>497</sup> Thus, it is warranted to ask: will CAFA’s “cases of national importance rule” adversely affect insurers—class action defendants who might prefer to litigate certain insurance-related disputes in state courts

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<sup>491</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. at 5.

<sup>492</sup> Pear, *supra* note 490.

<sup>493</sup> *Id.*

<sup>494</sup> See, e.g., *Blackfeet Nat’l Bank v. Nelson*, 171 F.3d 1237, 1244 n. 10 (11th Cir. 1999) (“[F]ederal laws involving issues of paramount national concern ... have been held to be exempt from the reverse preemption provisions of McCarran-Ferguson” (citing *Stephens v. Nat’l Distillers & Chem. Corp.*, 69 F.3d 1226, 1231 (2d Cir. 1995))).

<sup>495</sup> See Margo Beller, *History Repeats Insurance Debate Before US Courts*, J. OF COM., June 9, 1994, at 9A (“The decision in *United States vs. South-Eastern Underwriters Association* had two immediate consequences. One was to overturn its own previous case law that had given states the power to regulate insurance transactions within their borders. The other was to provoke Congress into passing legislation that amended the Sherman Act and others so that federal antitrust law would not apply to ‘the business of insurance to the extent that such business is not regulated by state law’ except for incidents of coercion, intimidation or boycott.”).

<sup>496</sup> See *supra* notes 279–96 and accompanying text.

<sup>497</sup> See *id.*

rather than in federal courts? Debatably, CAFA's rule will undermine the very purpose of the McCarran-Ferguson Act, by decreasing state courts' powers and increasing federal courts' powers to "regulate" the insurance industry.<sup>498</sup> As support for this point of view, consider the following discussion.

The United States Constitution, federal laws, and treaties create various rights and obligations,<sup>499</sup> and Congress has given federal district courts original jurisdiction over civil actions when those rights and obligations generate federal questions of law and fact.<sup>500</sup> The "well-pleaded complaint" rule, however, is strict: federal district courts may not exercise federal question jurisdiction unless a "substantial question of federal law" appears on the face of a plaintiff's complaint.<sup>501</sup> Stated slightly differently, a plaintiff must prove that he has a right to be in federal court and a federal right has been violated.<sup>502</sup>

Certainly, aggrieving insurance consumers' ability to file class actions against insurers in federal courts would be challenging if those plaintiffs

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<sup>498</sup> See Beller *supra* note 495 ("[E]ven after McCarran became law, questions over what parts of the insurance business are state-regulated have continued to bedevil insurers, legislators and regulators alike. Or as one legal scholar, Robert E. Keeton, a professor and associate dean at Harvard University Law School ... put it in his write-up of the South-Eastern case ... 'Underlying this continuing controversy over federal-state allocation of regulatory responsibility is a set of unanswered questions about the relative effectiveness of state and federal agencies. The answers to these questions may differ from generation to generation, and they are likely to be debatable in every generation.'"); see also Robert L. Redding, *Will 110th Congress Open the Door on the McCarran-Ferguson Act?*, AUTOINC. (Feb. 2, 2007), <http://www.autoinc.org/archives/2007/feb2007/legis.htm> ("The 110th Congress has an opportunity to revisit repeal of the McCarran-Ferguson Act. It is encouraged by the last Congress's interest in insurance reform, life insurance companies' desire for federal regulation of their industry and consumers and small business' longing for the regulation of an industry that could create a more level playing field. Fear in the insurance industry [of] strong federal regulation ... led to Congress passing the McCarran-Ferguson Act in 1945.... Interest in repealing McCarran-Ferguson is not new.").

<sup>499</sup> See 28 U.S.C. § 1331 (2006); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005).

<sup>500</sup> See 28 U.S.C. § 1331; *Exxon*, 545 U.S. at 552.

<sup>501</sup> See *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27–28 (1983) ("Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 153 (1908).

<sup>502</sup> See, e.g., *Oneida Indian Nation of N.Y. v. Oneida Cnty.*, 414 U.S. 661, 666 (1974) ("The threshold allegation required of such a well-pleaded complaint—the right to possession—was plainly enough alleged to be based on federal law.").



could not identify specific rights and remedies under federal statutes. And, without a doubt, CAFA’s “cases of national importance” rule is a procedural rather than a substantive rule.<sup>503</sup> But a fairly liberal reading of CAFA’s procedural rule is arguably ambiguous. Thus, that ambiguity could create an opening for class action complainants to remove purely substantive state law, business of insurance disputes from state courts to federal district courts. Quite simply, aggrieved consumers could assert that their substantive, “business of insurance” claim involves an issue of “national importance.” Would that argument work? The aggrieved insurance consumers probably would prevail, because federal courts have a long history of ignoring insurers/defendants’ numerous protestations and concluding that clearly substantive state law, business of insurance disputes were “matters of national concern.”<sup>504</sup>

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<sup>503</sup> *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407–08 (6th Cir. 2008) (“CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction. The statutory language notes that ‘[c]lass action lawsuits are an important and valuable part of the legal system’ because they allow aggregation of claims so that a defendant faces only a single action. Furthermore, CAFA states that ‘there have been abuses of the class action device,’ including that ‘[s]tate and local courts are ... keeping cases of national importance out of Federal court.’ According to the relevant Senate Report, CAFA was necessary because the previous law ‘enable[d] lawyers to ‘game’ the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests. CAFA provides defendants with access to the federal courts, ‘mak[ing] it harder for plaintiffs’ counsel to game the system by trying to defeat diversity jurisdiction, creat[ing] efficiencies in the judicial system by allowing overlapping and copycat cases to be consolidated in a single federal court, [and] plac[ing] the determination of more interstate class action lawsuits in the proper forum—the federal courts.’ ... CAFA [does] not to permit the splintering of lawsuits solely to avoid federal jurisdiction in the fashion done in this case.” (citing CAFA § 2(a)(1), (4)(A); 28 U.S.C. § 1711; S. Rep. No. 109-14, at 4–5; U.S. Code Cong & Admin. News 2005 at 3 (2005)) (internal quotation marks omitted)).

<sup>504</sup> *See, e.g., Blackfeet Nat’l Bank v. Nelson*, 171 F.3d 1237, 1244 n.10 (11th Cir. 1999) (“[F]ederal laws involving issues of paramount national concern—such as the Foreign Sovereign Immunities Act (FSIA) and the Civil Rights Act of 1964 (Title VII)—have been held to be exempt from the reverse preemption provisions of McCarran-Ferguson.”); *Stephens v. Nat’l Distillers and Chem. Corp.*, 69 F.3d 1226, 1232–33 (2d Cir. 1995) (citing the “national concern” ruling in *Spirt*, reiterating that it would defy common sense and congressional policy to exempt the insurance industry from the reach of federal anti-discrimination and labor-relations laws, stressing that the Foreign Sovereign Immunities Act reflects an equally important national concern—foreign policy, and concluding that “[o]ur precedent in *Spirt* requires us to apply federal law to the insurance industry, in spite of the McCarran-Ferguson Act, whenever federal law clearly intends to displace all state laws to the contrary”); *Klosterman v. W. Gen. Mgmt., Inc.*, 32 F.3d 1119, 1120 (7th Cir. 1994) (“[T]he state of health care insurance in our country” is a

Furthermore, citing the “national importance” language in CAFA’s class action removal rule, disgruntled insurance consumers might be able to commence purely substantive state law disputes against insurers in federal courts for another reason.<sup>505</sup> First, insurers as well as corporate defendants generally have asserted unambiguously that the CAFA creates various substantive and procedural “rights” for corporations as well as for those litigants who would sue corporations.<sup>506</sup> But even more importantly, federal courts could possibly: (1) cite CAFA’s “national importance” language, (2) create substantive rights “out of thin air,” and (3) declare that federal courts have subject matter jurisdiction over purely state law, business of insurance controversies.<sup>507</sup> Most assuredly, such judicial creativity has happened before.<sup>508</sup>

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“national concern”); *Metrolina Family Practice Grp., P.A. v. Sullivan*, 767 F. Supp. 1314, 1321 (W.D.N.C. 1989) (“The mere fact that an activity has been considered to be a ‘local interest’ in the past does not invalidate Congressional legislation: ‘Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation.’ The problem of limiting physicians’ fees in the federal health insurance program is indisputably of national concern.” (citing *Helvering v. Davis*, 301 U.S. 619, 641 (1936))); *Spirt v. Teachers Ins. & Annuity Ass’n*, 691 F.2d 1054, 1065–66 (2d Cir. 1982) (“The McCarran Act was never meant to prevent, and could not prevent, Congress from explicitly imposing requirements on employers and their agents under [federal] civil rights statutes, the National Labor Relations Act, or any other [federal] statute” designed to secure compliance with federal civil-rights and labor-relations policies as well as with other areas of national concern); *Dornberger v. Metro. Life Ins. Co.*, 961 F. Supp. 506, 521 (S.D.N.Y. 1997) (refusing to dismiss insureds’ putative class action against a life insurer who allegedly violated the Racketeer Influenced and Corrupt Organizations Act (RICO), reiterating that RICO’s purpose involves matters of “national concern,” and concluding that the McCarran-Ferguson Act’s reverse-preemption doctrine did not bar the insureds’ RICO claims); *In re Laitasalo*, 193 B.R. 187, 192 (Bankr. S.D.N.Y. 1996) (finding that federal bankruptcy laws recognize and embrace “important national concerns” involving “the treatment of foreign debtors, U.S. and foreign creditors and international commerce” and concluding that the McCarran-Ferguson Act’s reverse-preemption doctrine did not bar the bankruptcy court’s jurisdiction).

<sup>505</sup> See *infra* note 506.

<sup>506</sup> See, e.g., *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1017 (9th Cir. 2007) (“[G]iven CAFA’s purpose to increase class action litigants’ access to federal courts,” Progressive argued that federal courts “should interpret CAFA as allowing a plaintiff forced to defend a class action on the basis of a cross-complaint to have the same right to remove the class action as a defendant.”); *Plubell v. Merck & Co.*, 434 F.3d 1070, 1073–74 (8th Cir. 2006) (considering Merck’s argument that “CAFA confers a right to be in federal court” and concluding that “nothing in CAFA grants such a right”—but noting that CAFA’s emphasis on litigating “interstate cases of national importance” in federal courts was inserted for the benefits of society-at-large).

<sup>507</sup> See *infra* note 508.

<sup>508</sup> See, e.g., *BellSouth Telecomm., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1302 & n.32 (11th Cir. 2003) (Tjoflat, J., and Birch, J., dissenting)

Furthermore, a very liberal interpretation of the phrase “national importance” could encourage dissatisfied insurance consumers to file more class actions against insurers in federal courts. And if consumers prevailed, each successful lawsuit could allow federal judges to micromanage insurers’ business activities incrementally, state by state. To be sure, in recent years, federal courts have issued fairly far-reaching rulings that interfered with insurers’ ability to manage their core activities of assessing risks, setting and adjusting rates, setting premiums, and developing underwriting standards.<sup>509</sup> *Dehoyos v. Allstate Corporation* presents an excellent illustration of how federal courts could interfere effectively and increasingly with otherwise federally unregulated insurers’ freedom to manage their corporate activities and practice the business of insurance in a post-CAFA era.<sup>510</sup>

In *Dehoyos*, subsidiaries of Allstate Corporation (Allstate), the second largest liability insurer in the nation,<sup>511</sup> insured six racial minorities under

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(“After incorrectly asserting jurisdiction, I can hardly fault the district court for pulling the arbitrary-and-capricious standard out of thin air, giving only a ‘*Cf.*’ citation to a Supreme Court case ....”); *In re U.S. Catholic Conference*, 824 F.2d 156, 174 (2d Cir. 1987) (Cardamone, J., dissenting) (“There are only three instances when a district court’s action is *not* limited by its jurisdictional power .... From these three precisely defined rules the majority creates out of thin air an unprecedented fourth ....”); *Jersey Cent. Power & Light Co. v. F.E.R.C.*, 768 F.2d 1500, 1512 (D.C. Cir. 1985) (Mikva, J., dissenting) (“What is most startling is that the court’s opinion produces this new substantive right virtually out of thin air; the majority just makes it up. It is apparently of no concern to the majority that the Supreme Court has never suggested such a limit ....”).

<sup>509</sup> See, e.g., *Nat’l Distillers*, 69 F.3d at 1231 (“[T]he McCarran-Ferguson Act [did] not preclude the preempting of New York’s pre-judgment security requirement.”); *Spirt*, 691 F.2d at 1069–70 (concluding that the insurer’s use of sex-distinct mortality tables constituted unequal treatment and that the McCarran-Ferguson Act did not exempt the insurer’s business of insurance activities from complying with Title VII of the Civil Rights Act); *Cochran v. Paco, Inc.*, 606 F.2d 460, 467 (5th Cir. 1979) (holding that an insurer’s premium financing does not constitute the “business of insurance,” and therefore the McCarran-Ferguson Act does not preclude the application of the Truth in Lending Act’s disclosure requirements of the transactions since the McCarran Act must be “narrowly construed in the face of valid federal regulatory interests”).

<sup>510</sup> *Dehoyos v. Allstate Corp.*, 345 F.3d 290, 294–95 (5th Cir. 2003).

<sup>511</sup> See Michael Schroeder, *Insurers Fight to Save Terrorism Safety Net—Opponents Say Taxpayers Shouldn’t Underwrite Industry’s Exposure to Losses from Attacks*, WALL ST. J., May 5, 2005, at A4 (“The 2002 Terrorism Risk Insurance Act, which is set to expire at the end of the year, requires insurers to offer terrorism insurance to businesses and in return limits the industry’s losses in the case of attacks by foreign terrorists.... [The] chairman of Allstate Corp., of Northbrook, Ill., the second-largest home and auto insurer ... called on Congress to ... apply the backstop to losses of cars and homes due to terrorism.”).

various automobile and homeowners' insurance contracts.<sup>512</sup> The minorities accused Allstate of employing an impermissible discriminatory credit-scoring system.<sup>513</sup> More specifically, the racial minorities alleged that Allstate sold identical insurance contracts to all persons regardless of their racial or ethnic identities.<sup>514</sup> However, using an allegedly discriminatory credit-scoring system, Allstate required non-Caucasian applicants to pay substantially more for the same coverage.<sup>515</sup>

The racial minorities filed a class action.<sup>516</sup> The complaint alleged that Allstate violated sections 1981<sup>517</sup> and 1982<sup>518</sup> of the Civil Rights Act of 1866.<sup>519</sup> The complainants also alleged that Allstate violated the Fair Housing Act of 1968 (FHA).<sup>520</sup> Allstate filed a Rule 12(b)(6)<sup>521</sup> motion to dismiss, arguing that the McCarran-Ferguson Act (MFA)<sup>522</sup> preempted the application of the federal anti-discrimination statutes to the controversy.<sup>523</sup> The district court denied the motion, finding that the McCarran-Ferguson Act did not preclude the application of the civil rights statutes.<sup>524</sup> The lower court, however, granted a leave for an interlocutory appeal.<sup>525</sup>

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<sup>512</sup> *Dehoyos*, 345 F.3d at 293, 303.

<sup>513</sup> *Id.* at 300 (“[T]his nationwide class action challeng[es] insurers’ use of credit scoring in the pricing of automobile and home owners’ policies.”).

<sup>514</sup> *Id.* at 301.

<sup>515</sup> *Id.* at 290.

<sup>516</sup> *Id.*

<sup>517</sup> 42 U.S.C. § 1981(a) (2006) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”).

<sup>518</sup> *Id.* § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”).

<sup>519</sup> *Dehoyos*, 345 F.3d at 293.

<sup>520</sup> 42 U.S.C. §§ 3601–3619. Specifically, 42 U.S.C. § 3604(b) states: “[I]t shall be unlawful ... [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” *Id.* § 3604(b).

<sup>521</sup> FED. R. CIV. P. 12(b)(6) (stating that a party may assert a defense by motion of “failure to state a claim upon which relief can be granted”).

<sup>522</sup> 15 U.S.C. §§ 1011–1015 (1999).

<sup>523</sup> *Dehoyos*, 345 F.3d at 293–94.

<sup>524</sup> *Id.* at 294.

<sup>525</sup> *Id.*

Before the Fifth Circuit, Allstate argued again that the McCarran-Ferguson Act barred the nationwide class action.<sup>526</sup> As discussed earlier, the McCarran-Ferguson Act provides in pertinent part: “No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance.”<sup>527</sup> In *Humana Inc. v. Forsyth*,<sup>528</sup> the Supreme Court outlined the methodology that courts must apply when deciding preemption questions under the MFA.<sup>529</sup>

First, the Court expressly rejected the assumption that the MFA authorized a state supremacy “field preemption” approach to the application of federal law to the insurance industry.<sup>530</sup> Instead, the Court emphasized that courts must employ a “direct conflict” analysis to determine whether federal laws impair states’ authority and ability to regulate the business of insurance.<sup>531</sup> And the Supreme Court stated that the following formulation captures the meaning of impairment under 15 U.S.C. § 1012(b): “When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State’s administrative regime, the McCarran-Ferguson Act does not preclude its application.”<sup>532</sup>

However, to actually decide whether the MFA prevents federal laws from impairing state agencies’ ability to regulate the business of insurance, the Court ordered federal courts to consider and satisfy three criteria:

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<sup>526</sup> *Id.* at 296.

<sup>527</sup> 15 U.S.C. § 1012(b); *see also* *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995) (“The McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict (and so are preempted by) federal law are pertinent in deciding when federal rules ‘invalidate, impair, or supersede’ state rules.” (citation omitted)).

<sup>528</sup> *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

<sup>529</sup> *See id.* at 301.

<sup>530</sup> *Id.* at 300 (“The Court rejects the Humana petitioners’ suggestion that the word ‘impair,’ in the McCarran-Ferguson Act context, signals Congress’s intent to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise. If Congress had meant generally to preempt the field for the States, Congress could have said either that ‘no federal statute [that does not say so explicitly] shall be construed to apply to the business of insurance’ or that federal legislation generally ... would be ‘applicable to the business of insurance [only] to the extent that such business is not regulated by state law.’”).

<sup>531</sup> *Id.* at 305.

<sup>532</sup> *Id.* at 310.

(1) [T]he federal law in question must not be specifically directed at insurance regulation; (2) there must exist a particular state law (or declared regulatory policy) enacted for the purpose of regulating insurance; and (3) application of the federal law to the controversy in question must invalidate, impair or supersede that state law.<sup>533</sup>

Applying *Humana*'s preemption standard, the Fifth Circuit declared that MFA did not bar the racial minorities in *Dehoyos* from suing Allstate under federal civil-rights statutes.<sup>534</sup> The Court of Appeals found that the federal anti-discrimination laws did not interfere with Florida's and Texas's insurance statutes or regulations, and did not undermine those states' ability to regulate the business of insurance.<sup>535</sup> Justice Edith Jones, however, wrote a compelling dissent, which describes and discusses the types of interferences that insurers are likely to encounter increasingly from federal courts in a post-CAFA era.<sup>536</sup> She wrote:

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<sup>533</sup> *Dehoyos v. Allstate Corp.*, 345 F.3d 290, 294–95 (5th Cir. 2003) (citing *Humana Inc.*, 525 U.S. at 307, 310); *see also* *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 708 (5th Cir. 2002) (declaring that “[t]he test under McCarran-Ferguson is not whether a state has enacted statutes regulating the business of insurance, but whether such state statutes will be invalidated, impaired, or superseded by the application of federal law,” and concluding that MFA preemption would not be found merely because a state has a mechanism in place for regulating insurance contracts (quoting *Miller v. Nat’l Fidelity Life Ins. Co.*, 588 F. 2d 185, 187 (5th Cir. 1979))).

<sup>534</sup> *Dehoyos*, 345 F.3d at 299.

<sup>535</sup> *Id.* at 298 (“Appellants argue that the application of the civil rights statutes at issue here would frustrate Texas and Florida state insurance policy by frustrating the ability of those states to regulate insurance pricing policies.... Obviously this assertion is not nearly enough to withstand *Humana* scrutiny. Appellants cannot demonstrate that the federal law in question frustrates a policy associated with the regulation of insurance pricing without identifying an actual policy.”).

<sup>536</sup> *Id.* at 300–01.



The majority ... fails to recognize that a disparate impact claim goes to the heart of the risk adjustment that underlies the insurance business .... “Risk discrimination is not race discrimination.” Every insurer sets ... prices according to the risk [associated with] particular categories of customers.... Since risk determinations are mathematically complex and multi-faceted, unraveling a single thread, like credit scoring ... necessarily affects the entire fabric.... [T]he instant class action inevitably draws federal courts into the mechanics of insurance pricing .... The McCarran-Ferguson Act was designed precisely to prevent this type of federal interference .... [because] federal courts are not competent to tread in the essential domain reserved to state regulators. [Today], credit scoring is alleged to have a disparate impact. Tomorrow, some other facially neutral criterion ... may fall under legal attack.<sup>537</sup>

Quite interestingly, around the time Justice Jones was writing her fairly prescience dissent in 2003, lobbyists for the largest alliance of insurance associations and companies were gathering frequently in the halls of Congress.<sup>538</sup> They were encouraging legislators to allow corporate defendants

<sup>537</sup> *Id.* (Jones, J., dissenting) (citation omitted).

<sup>538</sup> *Cf.* Editorial, *Stop Class-Action Abuses*, HARTFORD COURANT, Aug. 22, 2003, at A10 (“Class-action lawsuits sometimes serve a useful purpose by combining the complaints of many people into a single action. But abuses such as venue shopping are legion. After five years of trying, Congress appears ready to curtail the worst abuses. The Class Action Fairness Act was approved 253-170 in the House and waits Senate action.... No one in Congress is proposing doing away with class-action lawsuits. Rather, this overdue legislation would curtail some of the worst abuses. Legislators have debated the issue long enough. There’s no good reason to wait another year to adopt this important reform.”); Steven Brostoff, *Congressional Motion Can Be Deceiving*, PROP. & CAS./RISK & BENEFITS MGMT. EDITION (Oct. 1, 2003), <http://web3.propertycasualty360.com/2003/10/01/congressional-motion-can-be-deceiving> (“Periodically, I like to review some of the Congressional issues facing the insurance industry based on two dimensions—the probability of motion and the probability of movement. Motion means all the procedural doings on Capitol Hill relating to legislation, such as hearings, markups, negotiations, etc. Think of it in terms of the phrase ‘going through the motions.’ Movement is much more serious. It means that at least one branch of Congress, either the House or the Senate, actually passes a bill.... By civil justice reform, I mean everything other than asbestos, including class action ... When the 108th Congress convened, I thought civil justice reform would be one of the defining issues of the new Republican-led government. Not only were the primary advocates of civil justice reform in charge of the agendas in both the House and the Senate, but President Bush was committed to signing any reform bill that crossed his desk.... I really expected insurance regulatory reform to exhibit a little more life than it has so far. After all, there is a surprising amount of support for some type of federal action, even if there is no consensus. Within the insurance industry, the American Insurance Association, the American Council of Life Insurers, and the Council of Insurance Agents and Brokers back optional federal chartering. The Independent Insurance Agents & Brokers of America, which is still fleshing out its proposal, supports federal legislation maintaining state regulation....”).

to remove so-called “class actions of national importance” from allegedly biased and intimidating state courts to professedly more judicious and proficient federal courts.<sup>539</sup> But, that same year, attorneys for that same alliance filed an extremely telling and ostensibly “pro-federalism” amici curia brief in the Eleventh Circuit.<sup>540</sup> In that brief, the alliance of insurance conglomerates encouraged the appellate court to preserve fundamental principles of federalism by dismissing a class action of national importance, and reversing the district court’s ruling in *Gilchrist v. State Farm Mutual Automobile Insurance Co.*<sup>541</sup>

In *Gilchrist*, aggrieved consumers complained about insurers’ alleged violation of federal antitrust laws, an issue of unquestionable “national importance.”<sup>542</sup> Therefore, the consumers filed a nationwide class action asserting that various automobile insurers conspired and prevented insureds from purchasing automotive replacement parts from the “original equipment manufacturer.”<sup>543</sup> According to plaintiffs, the automobile insurers violated federal antitrust laws by causing the insureds to pay anti-competitive insurance premiums for expensive and inferior insurance contracts.<sup>544</sup> The federal district court certified a nationwide class, comprising of approximately 70 million insured consumers.<sup>545</sup> The property and casualty insurers appealed the decision.

Before the Eleventh Circuit, the defending insurers and those who filed the amici curia brief argued that when federal judges certify class actions like the one in *Gilchrist* and issue pro-consumer rulings, those judges effectively: (1) seize state insurance regulators’ authority to set rates,<sup>546</sup> (2) “impair [state regulators’] statutory authority” generally to

<sup>539</sup> See *supra* note 538.

<sup>540</sup> See Brief of Amici Curiae in Support of Appellants at iii, *Gilchrist v. State Farm Mutual Auto. Ins. Co.*, 390 F.3d 1327 (11th Cir. 2004) [hereinafter *Gilchrist Brief*] (“*Amici Curiae* Alliance of American Insurers, American Insurance Association, National Association of Independent Insurers, and National Association of Mutual Insurance Companies are among the largest national trade associations of property and casualty insurance in the United States.”).

<sup>541</sup> *Id.* at 21.

<sup>542</sup> See, e.g., *Martin-Trigona v. Fed. Reserve Bd.*, 509 F.2d 363, 367 (D.C. Cir. 1974) (stressing that anti-competitive considerations and antitrust policy are issues of national importance).

<sup>543</sup> *Gilchrist*, 390 F.3d at 1329.

<sup>544</sup> *Id.*

<sup>545</sup> *Id.*

<sup>546</sup> See *id.* at 1331 (insurers’ arguing that the class members’ claim is “clearly about rate-making and performance of the insurance contract”); *Gilchrist Brief* at 1 (“The District Court’s certification ruling arrogates to a single jury the power to set rates for auto insurance across the country—an essentially regulatory function that juries are ill-

regulate the business of insurance,<sup>547</sup> and (3) violate principles of federalism.<sup>548</sup> Ultimately, citing prior rulings, the Eleventh Circuit embraced the insurers’ defense, remanded the class action, and ordered the district court to dismiss it.<sup>549</sup> Nevertheless, we should not miss the important point: in *Gilchrist*, the insurers did not want the consumers’ class action to be litigated in federal court. Like the insurers-defendants in *Gilchrist*, insurance companies generally do not want to be the “named defendants” in federal class action lawsuits, when the complaint concerns insurers’ alleged business of insurance irregularities or violations under state or federal anti-discrimination, antitrust, and consumer-protection statutes.<sup>550</sup>

Again, consumers citing the “class actions of national importance” rule and filing an ever-increasing number of “business of insurance” disputes in federal court could arguably undermine state regulators’ and courts’ authority to regulate the business of insurance and increase federal judges’ authority to micromanage the affairs of insurance companies. If a critical mass of federal district judges issued rulings like the one in *Gilchrist*, CAFA’s removal provisions and its emphasis on litigating “cases of national importance” in federal courts would arguably accomplish effectively and inadvertently what many have advocated: more federal regulation of the insurance industry and a repeal of insurers’ “scarecrow”—the McCarran-Ferguson Act and its “reverse pre-emption doctrine.”<sup>551</sup>

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equipped to discharge.... [B]y centralizing the resolution of a rate dispute instead of deferring to state regulators, the District Court’s decision subverts the delicate federal-state balance that has long governed insurance regulation across the nation.”).

<sup>547</sup> *Gilchrist Brief* at 21.

<sup>548</sup> *Id.* (“When the policy considerations underlying the filed rate doctrine are considered together with the federalism principles codified in the McCarran-Ferguson Act, it is clear that class treatment of Plaintiffs’ claims illegitimately ousts the rate-setting prerogatives of state legislatures and therefore cannot be a method of resolving this case that is ‘superior to other available methods.’” (citing FED. R. CIV. P. 23(b)(3))).

<sup>549</sup> *Gilchrist*, 390 F.3d at 1335 (“As *Gilchrist*’s claim attacks rate-making and the performance of the insurance contract, both the business of insurance, and does not allege a cognizable antitrust boycott, the McCarran-Ferguson Act removes her claim from our jurisdiction.”); see also *Slagle v. ITT Hartford*, 102 F.3d 494, 498 (11th Cir. 1996) (holding that allegations of premium stabilization—through horizontal market allocation of the windstorm insurance market—was an attack on insurance rate-making); *Uniforce Temp. Pers., Inc. v. Nat’l Council on Comp. Ins., Inc.*, 87 F.3d 1296, 1299 (11th Cir. 1996) (awarding no relief and dismissing plaintiff’s antitrust claims because they centered on premiums and the insurers’ rate-making activity).

<sup>550</sup> See *Gilchrist*, 390 F.3d at 1335; see also *Slagle*, 102 F.3d 494; *Uniforce*, 87 F.3d 1296.

<sup>551</sup> *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 493 (5th Cir. 2006) (noting that the reverse preemption doctrine permits a state law to reverse preempt a federal statute if “(1) the federal statute does not specifically relate to the ‘business of insurance’,”

V. AN EMPIRICAL STUDY: THE DISPOSITION OF CONSUMERS' CLASS ACTION AGAINST MULTINATIONAL CORPORATIONS AND INSURANCE COMPANIES IN PURPORTEDLY "BIASED" AND "HOSTILE" STATE COURTS AND IN ALLEGEDLY "UNBIASED" AND "MORE COMPETENT" FEDERAL COURTS, 1925–2011

Again, CAFA allows class actions of "national importance" to be removed from state to federal courts.<sup>552</sup> To justify that policy, a majority in Congress concluded that "[s]tate and local courts ... sometimes [act] in ways that demonstrate bias against out-of-State defendants."<sup>553</sup> To help prove that state courts are biased against "foreign" class action defendants, CAFA's supporters cited a purportedly substantial body of statistical evidence; for example, to justify their votes for class action reforms, several senators cited a RAND Corporation's study<sup>554</sup> and a Manhattan Institute's

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(2) the state law was enacted for the 'purpose of regulating the business of insurance;' and (3) the federal statute operates to 'invalidate, impair, or supercede' the state law" (quoting *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998))).

<sup>552</sup> See, e.g., Pear, *supra* note 490 ("The bill [makes] it easier for defendants to shift such lawsuits from state courts to federal courts, where rules of evidence and procedure are often viewed as more favorable to defendants.... [T]he author of the bill, said, 'Class actions of national importance should be heard in federal court by a federal judge, not by a state or county court judge in one region of the country.'").

<sup>553</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 5.

<sup>554</sup> See 151 CONG. REC. 2085–86 (2005) (statement of Sen. George Allen) ("[S]ome opponents of the Class Action Fairness Act are still urging that the current class action system works well and that class action reform is unnecessary.... [However], numerous studies have documented class action abuses taking place in a small number of 'magnet' State courts, and by now, it is beyond legitimate debate that our class action system is in shambles.... A RAND Institute for Civil Justice (ICJ) Study on U.S. class actions released at the end of 1999 empirically confirms what has long been widely believed—State court consumer class actions primarily benefit lawyers .... The ICJ Study contains no data indicating that this problem exists in Federal court class actions."); *id.* at 1825–26 (statement of Sen. Orrin Hatch) ("Abuse of the class action system has reached a critical point, and it is time that we as a legislative body address the problem. The public is increasingly aware of the system's unfairness. News programs ... have covered the rise in class action jurisdictions in certain magnet jurisdictions, magnet meaning jurisdictions where these extortionate suits are brought because they can get a tremendous advantage regardless of whether they are right or wrong.... It is evident that a few key courts have been singled out by a small group of legal players in the class action world. This point is reinforced by a 2003 study conducted by the Institute for Civil Justice/RAND and funded jointly by the plaintiffs and defense bar to determine who gets the money in class action settlements."); *id.* at 1659 (statement of Sen. Herb Kohl) ("A RAND study offered three primary explanations for why national class action cases should be in federal court. First, Federal judges scrutinize class action allegations more strictly than State judges.... Second, State judges may not have adequate resources to oversee and manage class actions with a

report to prove that a “class action problem” existed and that class action reforms were necessary.<sup>555</sup>

However, after carefully weighing the allegedly sound statistical evidence, anti-reformers correctly noted that no one had presented any compelling empirical evidence to justify Congress changing the practice of letting state courts adjudicate class actions that involve primarily state law issues.<sup>556</sup> In fact, after reviewing all proffered data and statistics, the Board of Directors for the Conference of Chief Justices concluded that CAFA is simply unwarranted, because state judiciaries are fair and competent to “hear and decide fairly class actions brought in state courts.”<sup>557</sup>

In addition, opponents of class action reforms argued that documented “judicial bias” was not rampant in federal courts; therefore, they argued that forcing aggrieved class members to litigate clearly substantive state law claims in federal courts unjustifiably victimizes those complainants and undermines the principle of judicial federalism.<sup>558</sup> To illustrate the tenor of the argument and consumer advocates’ concerns, consider one senator’s observations during the CAFA debate. He stated: “Federal courts are not friendly to class actions. They are very strict [about selecting cases to] consider, and [federal courts severely limit the] scope of liabilities. The business interests that are pushing [CAFA] know ... if they can get these lawsuits into a federal court, they are less likely to be found liable.”<sup>559</sup>

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national scope. Finally, if a single judge [will decide] what law will apply in a multistate class action, it is more appropriate that this take place in Federal court than in State court”).

<sup>555</sup> See *id.* at 1659 (statement of Sen. Herb Kohl) (“The class action process is clearly in serious need of reform. Comprehensive studies support this position. For example, a study on the class action problem by the Manhattan Institute finds that class action cases are being brought disproportionately in a few State courts so that the plaintiffs’ lawyers may take advantage of those specific courts that have relaxed class action rules”).

<sup>556</sup> See *id.* at 1649 (Letter to the Majority and Minority Leaders from Fifteen State Attorneys General) (“There is no compelling need or empirical support for such a sweeping change in our long-established system for adjudicating state law issues.”).

<sup>557</sup> See *id.* at 2086 (statement of Sen. Hillary Clinton) (“That evidence simply does not exist.”); *id.* at 1658 (statement of Sen. Russell Feingold) (“One frequent argument is that businesses cannot get a fair day in court because of renegade State court judges. Yet, there really is no evidence to back up these claims. Of the 3,141 counties, parishes, and boroughs in the State court systems of the United States, the so-called American Tort Reform Association could only identify nine jurisdictions that they consider ‘unfair’ to defendants. Four other jurisdictions were declared as ‘dishonorable mentions.’ But, the association only provided data on two of these jurisdictions—Madison County, Illinois ... and St. Clair County, Illinois.”).

<sup>558</sup> See 151 CONG. REC. 1645 (statement of Sen. Dick Durbin).

<sup>559</sup> *Id.* at 1660.

During those same debates, another legislator embraced those remarks and added the following: “[CAFA] reduces each state’s power to protect its own citizens and enforce its own laws. Moving these cases to federal court will often end them for all practical purposes. Federal courts may decide [that such cases] do not meet the federal rules for class certification. Even if the cases are not dismissed, plaintiffs [who are] forced into federal court on state law claims have the decks stacked against them ... because [f]ederal [judges] take the narrowest possible view [when] interpreting state laws.”<sup>560</sup>

Without a doubt, it is a serious charge when one asserts or even suggests that state or federal judges are prejudiced and have hostilities against certain classes of litigants. But that charge is even more severe and troublesome when: (1) out-of-state defendants claim that elected state court judges allow personal and local prejudices to adversely affect judicial proceedings and outcomes, or (2) federal diversity litigants believe that politically appointed federal judges wittingly or unwittingly allow regional, racial or political biases to determine the disposition of cases.

Thus, at this point, it is appropriate to ask: do state court and federal judges allow their alleged biases, as well as irrelevant factors, affect the administration of justice and the disposition of class actions? At another time, and after carefully examining a large number of reported cases, the author gathered empirical evidence to determine whether “judicial bias” was present in state and federal courts, and, if so, whether such bias colored judges’ substantive and procedural rulings.<sup>561</sup> In a series of published law review articles, the author documented and reported that state and federal judges allow immaterial or extralegal variables to significantly influence plaintiffs and defendants’ likelihoods of winning procedurally and on the merits in a variety of lawsuits.<sup>562</sup>

Therefore, considering the continuing and heated class action debates and litigation, the author decided to conduct an empirical study to determine whether irrelevant or prejudicial factors were systematically affect-

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<sup>560</sup> See *id.* at 1646 (statement of Sen. Ted Kennedy). But see *id.* at 1821 (quotes from a letter submitted by Walter E. Dellinger of O’Melveny & Myers, LLP) (“To the contrary, federal ‘[c]ourts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit,” (citing *Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 315 (3d Cir. 1998))).

<sup>561</sup> See Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 77, 88, 90–91 nn.58, 103 & 111–12 (2008) (presenting a fairly comprehensive history and description of Professor Rice’s published content-analysis studies and theoretical analyses of various common-law and statutory questions).

<sup>562</sup> *Id.*



ing, either intentionally or unintentionally, the disposition of class actions in allegedly “impartial” and “competent” federal courts as well as in supposedly “biased” and “incompetent” state courts. In light of the author’s prior studies and findings, the results appearing in this study were not surprising: although learned and well-intentioned judges profess to use only established legal doctrines and public policy to achieve fair outcomes, the evidence in this class action study suggests otherwise.<sup>563</sup>

#### *A. Data Sources and Sampling Procedures*

The dominant general proposition in this study is that no statistically significant difference exists between the disposition of complainants’ class actions against multinational corporations and insurers in federal and state courts. To construct the class action database, the author employed a multipronged methodology. First, Westlaw and Lexis data retrieval systems were used to locate every reported class action decision that had terminated in a trial, an appellate, or a supreme court. Second, if the electronically reported cases mentioned or cited other unreported class action cases, the author canvassed various regional reporters to locate those latter cases. Third, the author wanted to secure a representative sample of corporate or business related class action cases. Therefore, the author took a proportional stratified random sample<sup>564</sup> of all class action cases that had been decided procedurally or on the merits between 1925 and 2011.<sup>565</sup> Those efforts produced 824 corporate entities and insurance related class actions.<sup>566</sup> But note that the author’s entire database comprises 2,657 state and federal court decisions.<sup>567</sup>

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<sup>563</sup> See *infra* Part V.C–E.

<sup>564</sup> See, e.g., *Ratanasen v. Cal. Dep’t of Health Servs.*, 11 F.3d 1467, 1470–72 (9th Cir. 1993) (discussing the differences between and the efficacy of employing “simple random sampling” and “stratified random sampling”); Bruce M. Price, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (And Some Unintended Consequences)*, 26 YALE L. & POL’Y REV. 135, 138 (2007) (“Using a proportional, stratified, random sample of bankruptcy cases from [two twelve-month periods, the author created a] ... database of cases for every state in the Tenth Circuit.”).

<sup>565</sup> The investigator searched Westlaw’s MIN-CS, ALLSTATES, ALLFEDS, CTA and DCT databases between May 2008 and June 2011. In addition, the author searched various regional reporters as well as LEXIS’s Genfed Library, COURTS File during the same period.

<sup>566</sup> See *supra* note 565.

<sup>567</sup> The study was also designed to perform a small, exploratory comparative analysis of class actions and non-class action dispositions in state and federal courts between 1925 and 2011. Therefore, see *infra* Table A in the Appendix, along with a brief discussion of the most relevant variables and statistics in that table.

Again, the author's general and corollary hypotheses are these: (1) No statistically significant difference exists between class action plaintiffs and defendants' likelihood of prevailing in state and federal courts; (2) class action defendants rather than class members are significantly more likely to prevail in class action controversies regardless of whether the actions originated in state courts or in federal courts; and (3) both state and federal courts are likely to permit immaterial factors such as complainants' ethnicity, litigants' geographic origin, and litigants' legal status to influence complainants' or defendants' likelihood of winning or losing class actions procedurally or on the merits. To test these hypotheses, the author performed a content analysis of each case in the study.<sup>568</sup>

*B. Background Characteristics of Class Action Litigants in State and Federal Courts, 1925–2011*

There are 824 class action cases in the study, 407 and 417 state and federal class actions, respectively.<sup>569</sup> Table 1 presents frequencies and percentages that illustrate the disposition of those class actions.<sup>570</sup> First, "Litigants' Ethnicity" is a variable that appears in Table 1.<sup>571</sup> The results show very little difference in the racial composition of class members who initiated class actions in state and federal courts.<sup>572</sup> As would be expected, nearly 90% of the members comprising both state and federal class actions have diverse ethnic backgrounds.<sup>573</sup> The reported percentages are 88.2% and 85.6%, respectively.<sup>574</sup> The results do reveal, however, that a higher percentage of "African-American, only" class actions are filed in federal courts than in state courts—9.8% versus 1.5%.<sup>575</sup> Perhaps, this tendency

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<sup>568</sup> See Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 588–95 (1991) (performing a content analysis to examine Justices Brennan and Rehnquist's opinions and learning that both justices employed precedents rather than other methods to reach conclusions); Darrell L. Ross, *Emerging Trends in Correctional Civil Liability Cases: A Content Analysis of Federal Court Decisions of Title 42 United States Code Section 1983: 1970–1994*, 25 J. CRIM. JUST. 501, 506–07 (1997) (performing a content analysis of 3,205 reported decisions and finding an unexpected overrepresentation of jail inmates in the sample).

<sup>569</sup> See *infra* Table 1. A copy of the author's database is available at the office of the *William & Mary Business Law Review*.

<sup>570</sup> See *infra* Table 1.

<sup>571</sup> See *infra* Table 1.

<sup>572</sup> See *infra* Table 1.

<sup>573</sup> See *infra* Table 1.

<sup>574</sup> See *infra* Table 1.

<sup>575</sup> See *infra* Table 1.

can be explained by looking at the second variable, “Claims & Causes of Action,” in Table 1.<sup>576</sup>

TABLE 1  
THE DISPOSITION OF CLASS ACTION LAWSUITS IN STATE AND FEDERAL  
COURTS BY VARIOUS DEMOGRAPHIC CHARACTERISTICS, 1925–2011  
(N = 824)

Demographics	State Class Actions (N = 407)		Federal Class Actions (N = 417)	
	Frequency	Percent	Frequency	Percent
<b>Litigant’s Ethnicity:</b>				
Diverse Groups	359	88.2	357	85.6
Anglo-American, only	18	4.4	5	1.2
African-American, only	6	1.5	41	9.8
Other Minorities	24	5.9	14	3.4
<b>*Claims &amp; Causes of Action:</b>				
Common-Law Contracts	185	45.5	111	26.6
Common-Law Torts	117	28.8***	103	24.7***
Consumer-Protection	132	32.4***	157	37.7***
Civil-Rights	20	5.0***	92	22.1***
Securities	30	7.4	73	17.5
Antitrust	10	2.5***	23	5.5***
Environmental	16	3.9	5	1.2
<b>Circuits:</b>				
First	6	1.5	16	3.8
Second	24	5.9****	41	9.8****
Third	78	19.2****	45	10.8****
Fourth	16	3.9	17	4.1
Fifth	41	10.1****	58	13.9****
Sixth	35	8.6	31	7.4
Seventh	35	8.6	41	9.8
Eighth	38	9.3	37	8.9
Ninth	37	9.1	44	10.5
Tenth	19	4.7	12	2.9
Eleventh	75	18.4****	66	15.8****
Federal	3	0.7	9	2.2

\*The sums of these columns exceed unity (100%), since multiple claims and causes appeared in many class-action complaints.

Levels of statistical significance:

\*\*\*\* Chi Square = 27.1669,  $df=11$ ,  $p \leq 0.001$

\*\*\* Spearman’s rank test:  $\rho = 0.86$ ,  $p \leq 0.01$

First, when complainants commenced class actions in state courts, a greater proportion of class members are more likely to sue corporate entities and insurers for allegedly breaching contracts, committing various common law torts and violating consumer-protection laws.<sup>577</sup> The per-

<sup>576</sup> See *infra* Table 1.

<sup>577</sup> See *supra* Table 1.

centages are 45.5%, 28.8%, and 32.4%, respectively.<sup>578</sup> Although the order and magnitudes of the percentages differ a bit, class members presented the same theories of recovery when members filed class actions in federal courts—26.6%, 24.7% and 37.7%, respectively.<sup>579</sup>

There are, however, three notable variations when comparing state and federal class members' theories of recovery.<sup>580</sup> Among federal class actions, greater numbers of class members sued multinational insurers and other corporate entities for violating federal antitrust, securities, and civil rights statutes.<sup>581</sup> The corresponding percentages are 5.5%, 17.5% and 22.1%, respectively.<sup>582</sup> And very likely, the fairly large percentage of federal civil rights claims explains the relatively larger percentage of "African-American, only" class actions that are litigated in federal courts rather than in state courts—9.8% versus 1.5%.<sup>583</sup>

"Circuits" is the last variable appearing in Table 1.<sup>584</sup> It identifies the location of both state and federal courts within the twelve federal circuits; it also shows the numbers of and percentages for class actions that commenced within those respective courts.<sup>585</sup> First, the results show that state courts within the Third, Fifth, and Eleventh Circuits heard and tried a significant percentage (47.7%) of state law class actions.<sup>586</sup> The respective individual percentages are 19.2%, 10.1%, and 18.4%.<sup>587</sup> Likewise, federal courts within those same circuits, Third, Fifth, and Eleventh, also heard and resolved an appreciably large percentage (40.5%) of federal class actions.<sup>588</sup> Those corresponding percentages are 10.8%, 13.9%, and 15.8%.<sup>589</sup> The majority of the remaining class actions were distributed among state and federal courts in the Second, Sixth, Seventh, and Ninth Circuits.<sup>590</sup> In the next section, the relevance of these particular numbers and percentages will be discussed more fully.<sup>591</sup>

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<sup>578</sup> See *supra* Table 1.

<sup>579</sup> See *supra* Table 1.

<sup>580</sup> See *supra* Table 1.

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<sup>582</sup> See *supra* Table 1.

<sup>583</sup> See *supra* Table 1.

<sup>584</sup> See *supra* Table 1.

<sup>585</sup> See *supra* Table 1.

<sup>586</sup> See *supra* Table 1.

<sup>587</sup> See *supra* Table 1.

<sup>588</sup> See *supra* Table 1.

<sup>589</sup> See *supra* Table 1.

<sup>590</sup> See *supra* Table 1.

<sup>591</sup> See *infra* Part V.C.

TABLE 2  
THE PROCEDURAL AND FINAL DISPOSITION OF CLASS ACTION LAWSUITS IN  
STATE AND FEDERAL COURTS, 1925–2011  
(N = 824)

Demographics	State Class Actions (N = 407)		Federal Class Actions (N = 417)	
	Frequency	Percent	Frequency	Percent
<b>Disposition—Trial Courts:</b>				
Procedural	317	77.9	328	78.6
Merits	90	22.1	89	21.4
<b>Disposition—Appeals Courts:</b>				
Procedural	232	57.0***	154	37.0***
Merits	73	17.9	60	14.4
No Appeals	102	25.1***	203	48.6***
<b>Disposition—Supreme Courts:</b>				
Procedural	108	26.5***	2	0.50***
Merits	31	7.6	1	0.25
No Appeals	268	65.9***	414	99.3***
<b>Outcome—Trial Courts:</b>				
Class Members Won	179	44.0	170	40.8
Class Members Lost	228	56.0	247	59.2
<b>Outcome Among Class Members Who Appealed to Appellate Courts:</b>				
Class Members Won	138	45.2**	81	37.9
Class Members Lost	167	54.8	133	62.1**
<b>Outcome Among Class Members Who Appealed to Supreme Courts:</b>				
Class Members Won	60	43.2	2	66.7**
Class Members Lost	79	56.8**	1	33.3
<b>Levels of statistical significance:</b>				
*** Spearman’s rank-order test: States vs. Federal Comparison— $\rho = 0.84$ , $p \leq 0.01$				
** Spearman’s rank-order test: States vs. Federal Comparison— $\rho = -0.54$ , $\text{Prob}( t ) = 0.2657$ (ns)				

Table 2 presents the procedural and final dispositions of class actions in state and federal courts, without knowing any of the litigants’ demographic characteristics, theories of recovery, or other attributes.<sup>592</sup> The first half of Table 2 shows the procedural dispositions of class actions in state and federal judiciaries’ respective trial, appellate, and supreme courts.<sup>593</sup> Overall, the percentages reveal that class actions in both state and federal

<sup>592</sup> See *supra* Table 2. A copy of the author’s database is available at the office of the *William & Mary Business Law Review*.

<sup>593</sup> See *supra* Table 2.

courts are significantly more likely to be decided procedurally rather than on the merits.<sup>594</sup>

To illustrate, the first two rows of percentages show that state trial courts and federal district courts decided relatively smaller numbers of class actions on the merits.<sup>595</sup> The reported percentages are 22.1% and 21.4%, respectively.<sup>596</sup> Conversely, the overwhelming majority of class actions in those lower state and federal courts were decided procedurally—77.9% and 78.6%, respectively.<sup>597</sup> More telling, the percentages are nearly identical for both state and federal lower courts.

Furthermore, although there are some notable differences in the magnitudes of the percentages, state and federal appellate courts generally resolve class actions in a similar pattern.<sup>598</sup> Consider Table 2 again and look at the percentages appearing in the third and fourth rows. Of the class actions reaching state and federal courts of appeals, only a few were decided on the merits—17.9% and 14.4%, respectively.<sup>599</sup> On the other hand, state appellate courts decided 57.0% of all cases procedurally; and federal courts of appeals decided 37.0% of all class actions procedurally.<sup>600</sup> But it is significant to note that 25.1% of state court litigants decided not to appeal state trial courts' class action decisions.<sup>601</sup> However, nearly 48.6% of federal court litigants did not appeal federal district courts' class action rulings.<sup>602</sup> And even fewer state and federal litigants appealed adverse class action decisions to the various supreme courts.<sup>603</sup> The corresponding percentages in that table's eighth row are 65.9% and 99.3%, respectively.<sup>604</sup>

The remaining numbers and percentages in the bottom half of Table 2 illustrate state and federal class members' win/loss ratios within various state and federal courts. First, consider the variable "Outcome-Trial Courts."<sup>605</sup> The results indicate that class members were more likely to lose than win class actions in state trial courts—56.0% versus 44.0%.<sup>606</sup>

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<sup>594</sup> See *supra* Table 2.

<sup>595</sup> See *supra* Table 2.

<sup>596</sup> See *supra* Table 2.

<sup>597</sup> See *supra* Table 2.

<sup>598</sup> See *supra* Table 2.

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<sup>602</sup> See *supra* Table 2.

<sup>603</sup> See *supra* Table 2.

<sup>604</sup> See *supra* Table 2.

<sup>605</sup> See *supra* Table 2.

<sup>606</sup> See *supra* Table 2.



And the pattern was similar for class members who filed class actions in federal district courts.<sup>607</sup> Those federal complainants lost and won 59.2% and 40.8% of the cases, respectively.<sup>608</sup>

The next variable, “Outcome Among Class Members Who Appealed to Appellate Courts,” shows win/loss ratios for litigants who decided to appeal adverse class action rulings to state and federal courts of appeals. Again, the results are clear: on appeal, class defendants rather than class members won the majority (54.8%) of class actions in state appellate courts.<sup>609</sup> Furthermore, among litigants who appealed disappointing federal district court decisions, class members’ likelihood of success deteriorated considerably.<sup>610</sup> Specifically, before federal courts of appeals, class members prevailed in just 37.9% of the class actions, while class defendants won an impressive 62.1% of the cases.<sup>611</sup> In addition, the last variable in Table 2 shows a similar win/loss ratio in state supreme courts. Again, class defendants won 56.8% of the class actions in state supreme courts, while class members won 43.3% of the cases in state supreme courts.<sup>612</sup>

*C. Bivariate Relationships Between Litigants’ Characteristics and the Disposition of Class Actions in Allegedly “Biased” State Courts and in Purportedly “Impartial” Federal Courts*

Again, the percentages in the previous section present a description of class members and defendants’ demographic characteristics as well as litigants’ win/loss ratios in various state and federal courts between 1925 and 2011. Thus, in light of those findings, reconsider briefly the general tone of the Senate and House debates just before Congress enacted the Class Action Fairness Act of 2005. Class action reformers strongly asserted that “class action reform [was] badly needed.... [because] crafty lawyers [were] gam[ing] the system by filing large, nationwide class action suits in certain preferred State courts.”<sup>613</sup> Other reformers embraced that view and added a little more: “[I]n recent years, class actions have been subject to abuses that actually work to the detriment of individual consumers [and] plaintiffs .... [Therefore such] gaming of the system clearly

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<sup>607</sup> See *supra* Table 2.

<sup>608</sup> See *supra* Table 2.

<sup>609</sup> See *supra* Table 2.

<sup>610</sup> See *supra* Table 2.

<sup>611</sup> See *supra* Table 2.

<sup>612</sup> See *supra* Table 2.

<sup>613</sup> 151 CONG. REC. 2645 (2005) (statement of Rep. Ric Keller).

works to the detriment of business [as well as the economy and jobs creation].”<sup>614</sup>

Still, other reformers asserted that lawyers’ “gaming of the system” and class action abuses only occurred in “sympathetic courts known as ‘magnet courts.’”<sup>615</sup> In fact, CAFA’s supporters called such state courts “judicial hellholes,”<sup>616</sup> because state court judges allegedly certified “frivolous class actions,”<sup>617</sup> created “judicial cultures that ignore legal protections,” and “intimidate[d] proponents of tort reform.”<sup>618</sup> But even more importantly, class action reformers claimed that biased state judges—who hear and decide cases in “judicial hellholes”—are more concerned about protecting the interests of in-state class members<sup>619</sup> than about protecting out-of-state corporate defendants’ and insurers’ due-process rights.<sup>620</sup>

Where are the purportedly biased and anti-corporate state courts located? According to some class action reformers, those tribunals are distributed nationwide—within and across the jurisdictional boundaries of the respective federal circuits.<sup>621</sup> But other reformers assert that “judicial hell-

<sup>614</sup> *Id.* at 2071 (statement of Sen. David Vitter).

<sup>615</sup> *See, e.g., id.* (statement of Sen. David Vitter) (“Often the [class action] decisions coming out of ... hand-picked and carefully selected venues are huge windfalls for trial lawyers and big law firms and a punch line for consumers and the people the lawyers claim to represent. There is now ... a full blown effort aimed at mining for jackpots in sympathetic courts known as ‘magnet courts’ for the favorable way they treat these cases.”).

<sup>616</sup> *Id.* at 2081 (statement of Sen. Jeff Sessions) (“Forum shopping occurs when the attorney sets out to try to find the best place to file the class action lawsuit.... [T]hat is not healthy. A report issued this year by the American Tort Reform Association about the abuse of this choice named ... various counties around the country as ‘judicial hellholes.’”).

<sup>617</sup> *See id.* (statement of Sen. Jeff Sessions); *see also id.* at 1664 (statement of Sen. Chuck Grassley) (“[M]any of these class actions are just plain frivolous lawsuits that are cooked up by the lawyers to make a quick buck, with little or no benefit to the class members who the lawyers are supposed to be representing. Out-of-control frivolous filings are a real drag on the economy. Many a good business is being hurt by this frivolous litigation cost. Unfortunately, the current class action rules are contributing to the cost of business all across America, and it particularly hits small business .... Too many frivolous lawsuits are being filed. Too many good companies and consumers [must] pay for this lawyer greed.”).

<sup>618</sup> *Id.* at 2081 (statement of Sen. Jeff Sessions).

<sup>619</sup> *See generally supra* notes 389–90 and accompanying text.

<sup>620</sup> *See* 151 CONG. REC. 2074 (statement of Sen. Orrin Hatch) (claiming that “magnet courts” in certain states violate class action “defendants’ due process rights”); *id.* at 2081 (statement of Sen. Jeff Sessions).

<sup>621</sup> *See, e.g., id.* at 2071 (statement of Sen. David Vitter) (“I [strongly] support ... the Class Action Fairness Act of 2005.... [W]e need to pass this bill [because] there are loopholes in the class action system .... Such abuses happen mainly in State and local

holes” are located in only a few states and counties within the Fifth, Seventh, and Eleventh Circuits.<sup>622</sup> In particular, reformers alleged that state court judges in Florida, Illinois, and Texas—in Palm Beach County,<sup>623</sup> Madison County,<sup>624</sup> and Jefferson County,<sup>625</sup> respectively—have the worst records for (1) certifying frivolous class actions, (2) allowing class members’ lawyers to corrupt the legal system, (3) issuing pro-plaintiff rulings, and (4) violating class action defendants’ procedural-due-process rights.<sup>626</sup>

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courts in cases that really ought to be heard in Federal court.... Often, these suits have very little, if anything, to do with the place in which they are brought. Rather, lawyers select the venues for strategic reasons, or for political reasons, a practice known as forum shopping.”); *id.* at 1670 (2005) (statement of Sen. Sam Brownback) (“Over the past decade, class action lawsuits have grown by over 1,000 percent nationwide, spurring a mass of these kinds of hasty, unjust [class action] settlements.”).

<sup>622</sup> See *infra* notes 623–26.

<sup>623</sup> See, e.g., 151 CONG. REC. 2074 (statement of Sen. Orrin Hatch) (“[I]n their effort to gain a financial windfall in class action cases, some aggressive plaintiffs’ lawyers file copycat class action lawsuits. This tactic helps explain the dramatic increase in filings in these magnet courts.... [T]hese duplicative actions are the product of forum shopping by the original lawyers who file similar actions in different State courts ... perhaps with the sole purpose of finding a friendly judge willing to certify the class.... There is not a single magnet State court in this country that has not encountered the copycat phenomenon.... [One] example of copycat lawsuits is *Flanagan v. Bridgestone/Firestone*, filed in Palm Beach County, FL. [That] lawsuit was but one of the approximately 100 identical class actions filed in State courts throughout the country ....”).

<sup>624</sup> See, e.g., *id.* at 2663 (statement of Rep. James Sensenbrenner) (“What has happened as a result of the abuse of the class action system is that judges in small out-of-the-way counties, like Madison County, Illinois and Jefferson County, Texas end up being the ultimate arbiters of interstate commerce. [CAFA] puts some balance back into the system.”).

<sup>625</sup> *Id.*

<sup>626</sup> See, e.g., *id.* at 2072 (statement of Sen. David Vitter) (“Madison County is a great example of one of these magnet jurisdictions. Once their reputation as a magnet jurisdiction is established, they attract major nationwide [class action] lawsuits that deal with interstate commerce—exactly the types of lawsuits that should be decided in the Federal court. As noted in one study: ‘Virtually every sector of the United States economy is on trial in Madison County, Palm Beach County, FL, and Jefferson County, TX—long distance carriers, gasoline purchasers, insurance companies, computer manufacturers and pharmaceutical developers.’”); *id.* at 1654–55 (statement of Sen. Orrin Hatch) (“Lincoln’s words no longer carry much meaning for some of the lawyers who have descended on Madison County. In the land of Lincoln, the rule of law has too often been corrupted almost beyond recognition by self-interested plaintiffs’ lawyers and seemingly pliant public officials. Some unscrupulous personal injury attorneys go forum shopping to find friendly jurisdictions. Certainly Madison County, IL is one of them.... [L]awyers often pick Madison County.... because it is what some call a magic jurisdiction.”).

First, to prove that “judicial hellholes” really exist, pro-CAFA supporters have cited year-to-year class action filings across all states.<sup>627</sup> When the number of filings appeared to be greater or worse than “expected” in certain state courts, class action reformers concluded that those were “judicial hellholes,” “magnet” jurisdictions or “magic courts.”<sup>628</sup> Stated another way, since class action filings allegedly “skyrocketed” in Madison County, Jefferson County, and Palm Beach County,<sup>629</sup> class action reformers maintained that state court judges in those jurisdictions are appreciably more likely to be biased against out-of-state corporate defendants and more likely to undermine or violate fundamental principles of judicial federalism.<sup>630</sup>

Second, to prove that supposedly “corrupt” and “self-interested” plaintiffs’ lawyers’ and “enabling” and “biased” state court judges’ collusive acts<sup>631</sup> prevent class action defendants from securing favorable outcomes,

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<sup>627</sup> See, e.g., *id.* at 2636 (statement of Rep. James Sensenbrenner) (“I rise in strong support of ... the Class Action Fairness Act of 2005. Today marks the culmination of nearly a decade of legislative efforts to end systematic abuse of our Nation’s class action system.... Since these reforms were first proposed, the magnitude of the class action crisis ... has become more and more urgent. The crisis now threatens the integrity of our civil justice system and undermines the economic vitality upon which job creation depends. A major element of the worsening crisis is the exponential increase in State class action cases in a handful of ‘magnet’ or ‘magic’ jurisdictions, many of which deal with national issues in classes. In the last 10 years, State court class actions nationwide have increased over 1,315 percent.”).

<sup>628</sup> 151 CONG. REC. at 2636.

<sup>629</sup> See, e.g., *id.* at 2074 (statement of Sen. Orrin Hatch) (“It has not taken the plaintiffs’ lawyers long to figure out which courts are good for their bank accounts. There was an 82-percent increase in the number of class actions filed in Jefferson County, TX, between the years of 1998 and 2000. During the same time span, Palm Beach County, FL, saw a 35-percent increase. The most dramatic increase, however, has occurred in Madison County, IL. Madison County has seen an astonishing 5,000-percent increase in the number of class action filings since 1998.... [T]he number of class actions filed in State courts has skyrocketed under current law: Palm Beach County, 35 percent in just 2 years or 3 years; Jefferson County, 82 percent in the same 2 or 3 years; and Madison County, over 5,000 percent.... [T]he overall increase in State courts [has been a] 1,315-percent growth.”).

<sup>630</sup> See *infra* notes 642, 644 and accompanying text.

<sup>631</sup> See, e.g., 151 CONG. REC. 2636 (statement of Rep. James Sensenbrenner) (“[W]hen the House considered this important [class action] reform in the last Congress, I remarked that, ‘[t]he class action judicial system has become a joke, and no one is laughing except the trial lawyers ... all the way to the bank.’ I imagine that laughter turned to nervous chuckles when [CAFA] emerged unscathed from the gauntlet in the other body with 72 votes last week .... [A]s the House prepares to pass this bill, I suspect you could hear a pin drop in the halls of infamous courthouses located in Madison County, Illinois and Jefferson County, Texas, where for so long the good times have rolled for forum-

class action reformers have cited purportedly large numbers of “forced settlements” and “judicial blackmails” in “magic jurisdictions.”<sup>632</sup> For example, during the fairly recent class action debates in the Senate, one influential pro-CAFA legislator asserted emphatically: “Many class actions appear to be filed solely for the purpose of forcing a settlement, not the protection of an interest of a class.”<sup>633</sup> Thus, according to that senator, and many other class action reformers, allegedly “forced settlements” are nothing less than “judicial blackmail.”<sup>634</sup> In addition, class action reformers have concluded that “judicial blackmail” only benefits class members’ unscrupulous lawyers,<sup>635</sup> while undermining the Nation’s economy,<sup>636</sup> consumers’ interests,<sup>637</sup> and the legitimate business interests of multinational corporations and insurers.<sup>638</sup>

Certainly, anti-reformers dispute multinational corporations’,<sup>639</sup> large insurance conglomerates’,<sup>640</sup> and other class action reformers’ allegations

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shopping plaintiffs’ attorneys and the judges who enable them.”); *see also id.* at 1654–55 (statement of Sen. Orrin Hatch).

<sup>632</sup> *See, e.g., id.* at 1670 (statement of Sen. Sam Brownback) (“[E]ven if [a] class certification ruling is unmerited or even unconstitutional, it often cannot be appealed until after an expensive trial on the merits of the case. Facing the cost of litigation often forces defendants to settle out of court with sizable payments, even when the defendant will likely prevail under the law.”).

<sup>633</sup> *See id.* at 1081 (statement of Sen. Jeff Sessions).

<sup>634</sup> *Id.* (statement of Sen. Jeff Sessions) (“[F]orcing a settlement ... has been referred to in debate frequently as ‘judicial blackmail.’”).

<sup>635</sup> *See supra* notes 629, 631 and accompanying text.

<sup>636</sup> *See, e.g.,* 151 CONG. REC. 1670 (statement of Sen. Sam Brownback) (“These settlements have come to be known as a form of traditional blackmail and are problematic to all Americans because they make trial lawyers rich while imposing increased costs on the economy, causing lower wages and higher prices for consumers.”).

<sup>637</sup> *Id.*

<sup>638</sup> *See, e.g., id.* at 2072 (statement of Sen. David Vitter) (“[T]he [class action] system is broken and we need to fix it so we do not hurt legitimate business, legitimate job-creation efforts .... Right now, businesses, fearing the mere threat of legal action, settle cases—a form of judicial blackmail. The whole economy is dragged down and fewer jobs are created as a result.”).

<sup>639</sup> *Cf. id.* at 2653 (statement of Rep. Marty Meehan) (“I rise in opposition to ... the so-called Class Action Fairness Act. Few of us would ... argue that there is too much accountability in corporate America .... In recent years, millions of our constituents have been swindled out of their retirement savings by corporate crooks at Enron, WorldCom, and other companies.”).

<sup>640</sup> *Cf. id.* at 1094 (statement of Sen. Harry Reid) (“The rejection of the Feinstein-Bingaman amendment shows this bill’s true colors.... [W]ithout that change, the truth is plain to see: [CAFA] is designed to bury class action lawsuits, to cut off the one means by which individual Americans ripped off by fraudulent or deceptive practices can band together to demand justice from corporate America.... [I]nsurance companies are ripping

about the supposedly large prevalence of biased state court judges and the wanting administration of justice in so-called “judicial hellholes.”<sup>641</sup> To counter the specific allegation that numerous “hellholes” exist and are undermining federalism,<sup>642</sup> one senator has stressed:

I oppose ... the Class Action Fairness Act of 2005, because I do not believe it is fair to litigants who have legitimate claims that are most appropriately addressed [in] state courts.... There have been many claims about ‘judicial hellholes’ and ‘magnet jurisdictions’ but the evidence shows that these claims are ... overstated, and ... not so widespread so as to justify passage of this legislation that turns 200 years of federalism on its head.<sup>643</sup>

In addition, class action reformers insist that state courts generally—like the alleged “judicial hellhole” in Madison County, Illinois—“are quick to certify classes.”<sup>644</sup> Therefore, reformers stress that it is unfair to force out-of-state corporations and their insurers to litigate “class actions of national importance” in those state courts.<sup>645</sup> But anti-reformers emphasize that class action reformers intentionally or unintentionally cloud the important distinction between the number of class action filings and the number of class certifications.<sup>646</sup> Therefore, states’ righters or opponents of class action reforms argue that even if the numbers of class action filings have increased in recent years, state courts are likely to certify only an infinitesimal number of class actions for trial.<sup>647</sup>

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people off all the time, and this legislation will give the biggest, best businesses in the world, the insurance companies, more money.”); *id.* at 2653 (statement of Rep. Joe Baca) (“[CAFA] is a payoff to large companies and special interests. It takes rights away from consumers in order to protect drug manufacturers, insurance companies, HMOs and negligent doctors. There is no accountability on their part.”).

<sup>641</sup> 151 CONG. REC. at 2086 (statement of Sen. Hillary Clinton).

<sup>642</sup> *Cf. id.* at 2072–73 (2005) (statement of Sen. David Vitter) (“[O]ur system of federalism is undermined today because one State’s legal system, rather than the legal system of the Federal branch of the courts, is making [class action] decisions that affect many or even all other States. So the system is not working for anyone but the lawyers and law firms gaming that system.”).

<sup>643</sup> *Id.* at 2086 (statement of Sen. Hillary Clinton).

<sup>644</sup> *See id.* at 2645–46 (statement of Rep. Ric Keller) (“[Plaintiffs’ lawyers file] large, nationwide class action suits in certain preferred State courts such as Madison County, Illinois, where judges are quick to certify classes .... Let us take a look at Madison County .... In 2002 ... there were 77 class action filings, and in 2003 there were 106 class action lawsuits filed. The movie ‘Bridges of Madison County’ was a love story. The ‘Judges of Madison County’ would be a horror flick.”).

<sup>645</sup> *Id.* (statements of Rep. Linda Sanchez).

<sup>646</sup> *See infra* note 647 (statement of Sen. Hillary Clinton).

<sup>647</sup> *Compare* 151 CONG. REC. 2071 (statement of Sen. David Vitter) (“Perhaps the best example nationwide, in terms of preferred venues for trial lawyers, is Madison



TABLE 3  
THE DISPOSITION OF CLASS ACTIONS IN STATE AND FEDERAL COURTS OF  
APPEALS BY SELECTED DEMOGRAPHIC CHARACTERISTICS OF LITIGANTS  
(N = 519)

Selected Demographics	Subcategories	State Courts' Disposition of Actions From Class Members' Perspectives			Federal Courts' Disposition of Actions From Class Members' Perspectives		
		Favorable	Unfavorable	(N = 305)	Favorable	Unfavorable	(N = 214)
		Percent	Percent	Number	Percent	Percent	Number
Class-Action Defendants	Insurers	43.3	56.7	(N = 201)	31.3	68.7	(N = 99)
	Corporations	56.3	43.7	(N = 94)	43.0	57.0	(N = 94)
	Public Entities	39.4	60.6	(N = 10)	44.4	55.6	(N = 21)
Claims & Causes	Breach-of-Contract	35.6	64.4	(N = 90)**	20.8	79.2	(N = 24)***
	Common-Law Torts	68.6	31.4	(N = 51)**	18.8	81.2	(N = 16)***
	Consumer-Protection	44.0	56.0	(N = 109)	26.1	73.9	(N = 65)***
	Civil-Rights	44.4	55.6	(N = 9)	55.4	44.6	(N = 56)***
	Securities	46.3	53.7	(N = 10)	43.2	56.8	(N = 37)
	Antitrust	50.0	50.0	(N = 4)	56.2	43.8	(N = 16)***
	Environmental	60.0	40.0	(N = 10)**	—	—	—
	Others	40.9	59.1	(N = 22)**	—	—	—
Region of Country	East	31.0	69.0	(N = 42)***	32.5	67.5	(N = 40)
	Midwest	41.9	58.1	(N = 86)***	37.8	62.2	(N = 45)
	South	59.3	40.7	(N = 86)***	46.3	53.7	(N = 54)
	Southwest	51.0	49.0	(N = 51)	33.3	66.7	(N = 36)
	West	35.0	65.0	(N = 40)***	35.9	64.1	(N = 39)
Courts' Location Within Federal Circuits	First Circuit	16.7	83.3	(N = 6)	40.0	60.0	(N = 5)
	Second Circuit	18.2	81.8	(N = 11)**	33.3	66.7	(N = 12)
	Third Circuit	38.0	62.0	(N = 21)**	33.3	66.7	(N = 18)
	Fourth Circuit	64.3	35.7	(N = 14)**	44.4	55.6	(N = 9)
	Fifth Circuit	46.3	53.7	(N = 41)	42.1	57.9	(N = 38)
	Sixth Circuit	40.0	60.0	(N = 20)**	50.0	50.0	(N = 14)
	Seventh Circuit	46.9	53.1	(N = 32)	15.8	84.2	(N = 19)
	Eighth Circuit	47.2	52.8	(N = 36)	52.6	47.4	(N = 19)
	Ninth Circuit	38.7	61.3	(N = 31)	41.4	58.6	(N = 29)
	Tenth Circuit	22.2	77.8	(N = 18)**	18.2	81.8	(N = 11)
	Eleventh Circuit	61.1	38.9	(N = 72)**	39.5	60.5	(N = 38)
	Federal Circuit	33.3	66.7	(N = 3)	50.0	50.0	(N = 2)

\*\*\* Chi square test statistically significant at  $p \leq 0.01$

\*\* Chi square test statistically significant at  $p \leq 0.05$

Given the severity of class action reformers' and anti-reformers' charges and counter-charges, the author decided to test the proposition that out-of-state defendants—multinational corporate entities and insurers—

County, IL, where class action filings between 1998 and 2000 increased nearly 2,000 percent.”), *with id.* at 2086 (statement of Sen. Hillary Clinton) (“[A] recent report by Public Citizen found that there were, at most, two jurisdictions—Madison County and St. Clair County, IL—of the 3,141 court systems in the United States for which bill proponents have provided limited data that they are ‘magnet jurisdictions.’ As to Madison County in particular, the facts ... do not support the rhetoric. In 2002, only 3 of 77 class actions were actually certified to proceed to trial, and in 2003, only 2 of 106 class actions filed were certified.”).

are substantially more likely to lose class actions in allegedly “biased and hostile” state courts than in supposedly “more principled and competent” federal courts.<sup>648</sup> Therefore, consider the information appearing in Table 3. At the outset, it is important to note that Table 3 presents the bivariate relationships between four independent variables and the outcome of class actions in both state and federal courts of appeals.<sup>649</sup> The author decided to explore the disposition of class actions in state and federal appellate courts for two reasons. First, appellate-court cases comprise arguably the truly dissatisfied class members and defendants who received adverse procedural and substantive outcomes in both state trial courts and federal district courts. Second, as illustrated in Table 2 and discussed above, state and federal appellate-court class action decisions are substantially more likely to be the “final decisions” than either state or federal trial-court or supreme-court decisions.<sup>650</sup>

The first variable in Table 3 is labeled “Class Action Defendants.”<sup>651</sup> It describes the types of defendants that class members sued in both state and federal courts of appeals from 1925 to 2011,<sup>652</sup> and the reported percentages illustrate the courts of appeals’ dispositions of class actions from the perspectives of class members.<sup>653</sup> The results are clear: when insurers and various public entities or corporations are sued, class members are more likely to lose in state courts of appeals.<sup>654</sup> Class members’ state court percentages are 56.7% and 60.6%, respectively.<sup>655</sup> On the other hand, when class members sue corporations in state appellate courts, plaintiffs are more likely to prevail. The reported percentage is 56.3%.<sup>656</sup>

The results are fairly similar for class members who sought relief in federal appellate courts: when insurers and various public entities were class action defendants, class members were more likely to lose the lawsuits in federal appellate courts.<sup>657</sup> The percentages are 68.7% and 55.6% respectively.<sup>658</sup> And although class members are more likely to prevail (56.3%) in state appellate courts when multinational corporate entities are

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<sup>648</sup> See *supra* Table 3. A copy of the author’s database is available at the office of the *William & Mary Business Law Review*.

<sup>649</sup> See *supra* Table 3.

<sup>650</sup> See *supra* Table 2.

<sup>651</sup> See *supra* Table 3.

<sup>652</sup> See *supra* Table 3.

<sup>653</sup> See *supra* Table 3.

<sup>654</sup> See *supra* Table 3.

<sup>655</sup> See *supra* Table 3.

<sup>656</sup> See *supra* Table 3.

<sup>657</sup> See *supra* Table 3.

<sup>658</sup> See *supra* Table 3.

defendants, class members are more likely to lose (57.0%) when multinational corporations are class defendants in federal courts of appeals.<sup>659</sup> When reviewing the general effects of types of defendants on the dispositions of class actions, the results show no statistically significant difference between class members’ win/loss ratios, when comparing class action outcomes in state appellate courts to those in federal courts of appeals.<sup>660</sup> These initial findings, therefore, do not support class action reformers’ broad assertion that corporate defendants are substantially more likely to lose class actions in allegedly “biased” and “unprincipled” state courts than in “competent” and “impartial” federal courts.<sup>661</sup>

For added statistical evidence that class action defendants—rather than class members—are substantially more likely to prevail in state and federal courts of appeals, one needs only to review the variable “Region of Country” in Table 3 and the corresponding percentages. First, the results are clear: multinational corporate entities, large insurance conglomerates and other class action defendants are more likely to prevail in federal courts of appeals than class members.<sup>662</sup> That finding appears regardless of whether the federal appellate courts are located in the Eastern, Midwestern, Southern, Southwestern, or Western regions of the country.<sup>663</sup> More precisely, federal class action defendants’ “win” percentages are 67.5%, 62.2%, 53.7%, 66.7%, and 64.1%, respectively.<sup>664</sup>

Also, barring two exceptions, class action defendants—rather than class members—are more likely to prevail in state courts of appeals.<sup>665</sup> Class members are more likely to win class action lawsuits in state courts of appeals that are located in the Southern and Southwestern regions of the country.<sup>666</sup> Those “win” percentages are 59.3% and 51.0%, respectively.<sup>667</sup> On the other hand, class members are exceedingly more likely to lose in state courts of appeals, which are located in the Eastern, Midwestern, and Western regions of the country.<sup>668</sup> State-appellate-court class members’ “loss” percentages within these latter regions are 69.0%, 58.1%, and 66.0%, respectively.<sup>669</sup>

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<sup>659</sup> See *supra* Table 3.

<sup>660</sup> See *supra* Table 3.

<sup>661</sup> See *supra* Table 3.

<sup>662</sup> See *supra* Table 3.

<sup>663</sup> See *supra* Table 3.

<sup>664</sup> See *supra* Table 3.

<sup>665</sup> See *supra* Table 3.

<sup>666</sup> See *supra* Table 3.

<sup>667</sup> See *supra* Table 3.

<sup>668</sup> See *supra* Table 3.

<sup>669</sup> See *supra* Table 3.

The final variable in Table 3 is labeled “Courts’ Location Within Federal Circuits.”<sup>670</sup> It has two meanings. First, when considering federal-court class actions, the variable retains its ordinary meaning. It describes the proper names of the twelve federal courts of appeals that reviewed federal district courts’ class action rulings.<sup>671</sup> The overwhelming majority of class action percentages reinforce earlier findings.<sup>672</sup> The First, Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Courts of Appeals were substantially more likely to decide against federal class members and in favor of corporate defendants.<sup>673</sup> Before those nine federal appellate courts, class members’ losses varied between 55.6% and 84.2%.<sup>674</sup> On the other hand, federal class members were more likely to win a majority (52.6%) of lawsuits only in the Court of Appeals for the Eighth Circuit.<sup>675</sup> And in the Sixth and Federal Courts of Appeals, federal complainants won just 50.0% of the class actions in each appellate court.<sup>676</sup>

“Courts’ Location Within Federal Circuits” also has a second meaning: it describes state class action litigants’ percentages of wins and losses in state appellate courts by considering whether a state court of appeal was located within the jurisdictional boundary of, say, the First Circuit, the Fourth Circuit, or some other federal circuit. Therefore, looking at the two left columns of percentages at the bottom of Table 3, we find generally no substantial statistical evidence suggesting that allegedly “prejudiced” and “hostile” state-appellate-court judges are more likely to decide class actions against out-of-state corporate defendants.<sup>677</sup> Or stated slightly differently, the results do not support class action reformers’ general assertion that supposedly “unprincipled” and “less competent” state-appellate-court judges predictably and consistently violate class action defendants’ procedural-due-process rights, and habitually undermine corporate and other defendants’ ability to win class actions procedurally or on the merits.<sup>678</sup>

Instead, the results show generally that multinational corporations, insurers, and other class action defendants are substantially more likely to prevail than lose in state appellate courts.<sup>679</sup> And the finding is consistent

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<sup>670</sup> See *supra* Table 3.

<sup>671</sup> See *supra* Table 3.

<sup>672</sup> See *supra* Table 3.

<sup>673</sup> See *supra* Table 3.

<sup>674</sup> See *supra* Table 3.

<sup>675</sup> See *supra* Table 3.

<sup>676</sup> See *supra* Table 3.

<sup>677</sup> See *supra* Table 3.

<sup>678</sup> See *supra* Table 3.

<sup>679</sup> See *supra* Table 3.

among state courts of appeals which are located within regions of the country over which the following federal circuits have jurisdictions: First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Federal Circuits.<sup>680</sup> Put simply, in those state courts of appeals, class members’ losses ranged between 52.8% and 83.3%.<sup>681</sup> On the other hand, class members were more likely to prevail in in-state appellate courts that are located within the jurisdictional boundaries of the Fourth and Eleventh Circuits.<sup>682</sup> Those “win” percentages are 64.3% and 61.1%, respectively.<sup>683</sup>

*D. Choice of Law Questions—The Bivariate Relationships Between Litigants’ Theories of Recovery and the Disposition of Class Actions in State and Federal Courts*

Earlier, this Article briefly discussed choice of law rules,<sup>684</sup> and two important constitutional principles were highlighted: under the *Klaxon-Erie* doctrine, a federal district court must apply the choice of law rules of the state in which it sits;<sup>685</sup> under the principle appearing in *Shutts*, a state court may freely choose and apply one of several state laws in a nationwide class action as long as the parties have “significant contacts” with the states and the choice of law is not arbitrary or fundamentally unfair.<sup>686</sup> Yet, conflicting opinions about choice-of-substantive-law rules still generate numerous problems for class action complainants who commence actions in state trial courts or in federal district courts.<sup>687</sup>

Even more noteworthy, Congress spent an inordinate amount of time debating choice of law rules, before enacting CAFA and sanctioning defendants’ right to remove allegedly “class actions of national importance” from state to federal courts.<sup>688</sup> As reported earlier, both CAFA’s support-

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<sup>680</sup> See *supra* Table 3.

<sup>681</sup> See *supra* Table 3.

<sup>682</sup> See *supra* Table 3.

<sup>683</sup> See *supra* Table 3.

<sup>684</sup> See *supra* Part IV.A.

<sup>685</sup> See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (requiring a federal court that sits in Delaware to apply conflict of laws rules that mirror rules cited and applied in Delaware’s state courts); *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992) (“[I]t is the duty of the federal court to determine as best it can, what the highest court of the state would decide.”).

<sup>686</sup> *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 821–22 (1985).

<sup>687</sup> See *supra* Part V.A.

<sup>688</sup> Cf. 151 CONG. REC. 1646 (2005) (statement of Sen. Ted Kennedy) (“We were also told [CAFA] would not shift cases to Federal courts unless they truly involve national issues, while State cases would remain in state court. [CAFA’s] actual effects are quite

ers and opponents understood that federal district courts are substantially more likely to deny Rule 23(b)(3) certification motions when wide variances exist among proposed class members' state law theories of recovery.<sup>689</sup>

Therefore, citing a need to remove a major class certification hurdle and codify *Shutts*'s constitutional principle in CAFA, legislators debated the merits of the earlier-discussed Feinstein-Bingaman amendment.<sup>690</sup> That proviso would have created an exception and allowed federal judges to certify a class, even though a class action pleading cited multiple and conflicting state laws.<sup>691</sup> However, a majority of class action reformers rejected that amendment.<sup>692</sup> The majority concluded that fundamental principles of federalism would have been undermined because the Feinstein-Bingaman proviso would have allowed federal district courts to apply a single state's law in a nationwide class certification proceeding.<sup>693</sup>

Conversely, anti-reformers were concerned about the adverse effects of CAFA's removal provisions on class members' ability to litigate federal substantive issues in state courts.<sup>694</sup> Specifically, some legislators claimed that class action reforms would allow primarily corporate defendants to remove civil-rights,<sup>695</sup> consumer-protection,<sup>696</sup> and wage-and-hour<sup>697</sup> class

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different. It does not just affect cases where the events affect people in multiple States ....").

<sup>689</sup> See *supra* notes 413–24 and accompanying text.

<sup>690</sup> See 151 CONG. REC. 1818.

<sup>691</sup> See *id.* at 1813 (Senator Feinstein's outlining of the parameters of the defeated Feinstein-Bingaman choice of law amendment); *id.* at 1832 ("The [Feinstein-Bingaman] amendment ... was rejected.").

<sup>692</sup> *Id.*

<sup>693</sup> See *id.* at 1820–21 (reporting CAFA supporters' embrace of legal conclusions and cases in a letter that Walter E. Dellinger of O'Melveny & Myers, LLP submitted to help defeat the Feinstein-Bingaman amendment).

<sup>694</sup> See, e.g., *id.* at 1828–30 (statement of Sen. Ted Kennedy).

<sup>695</sup> See, e.g., *id.* at 1828 (statement of Sen. Ted Kennedy) ("I urge all of my colleagues to support this amendment to exclude civil rights and wage and hour cases from the bill's provisions on removal of cases to Federal court. Working Americans and victims of discrimination seeking justice under State laws don't deserve to have the doors of justice slammed on such claims, but that is exactly what this bill will do."); *id.* at 2646 (statement of Rep. Bobby Scott) ("47 Attorneys General in States and territories, have come out against [CAFA] because it puts the Attorneys General in the same crack. They do not know where [a] case is going to be heard. If they bring a State action in State court, they may get removed. Some ... States have better wage laws, civil rights laws, sometimes consumer protections, and if the Attorneys General want to come in to protect their own citizens in their own States, they ought to have that right and not get jerked around to Federal court.").



actions from state to federal courts. But class action reformers argued that such concerns were unfounded, and strongly asserted that federal rather than state courts have been more favorable forums for class action plaintiffs to litigate civil rights and other federal law disputes.<sup>698</sup>

Finally, more than a century and a half ago, the Supreme Court reaffirmed the choice of law principle: to determine parties’ rights and obligations under a contract, the law of the place—where the contract was consummated—must govern the deliberations.<sup>699</sup> And, nearly eighty years ago, the Court also reconfirmed an equally important choice of law rule in *Ormsby v. Chase*.<sup>700</sup> In a tort action, a judge must apply the law of the

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<sup>696</sup> See, e.g., 151 CONG. REC. 2648 (statement of Rep. John Conyers) (“[CAFA] also makes it impossible for States to pursue actions against defendants who have caused harm to the State’s citizens. State attorneys general often pursue these claims under State consumer protection statutes, antitrust laws, often with the attorney general acting as the class representative for the consumers of the State. Under [CAFA], would we want these cases to be thrown into Federal court and severely impede the State’s ability to enforce its own laws for its own citizens? That is what will happen. That is what will take place.”).

<sup>697</sup> See, e.g., *id.* (statement of Rep. John Conyers) (“[I]t is very clear that ... this is not a simple procedural fix to class actions in our courts.... [And] it is clear that all of the totally unsatisfactory provisions have not been removed.... [CAFA] harms working Americans and victims of discrimination who are in no position to bring individual actions of wage-and-hour cases or civil rights discrimination claims. Moving the cases to federal court will result in many never being ever heard at all.”).

<sup>698</sup> See, e.g., *id.* at 1830–31 (statement of Sen. Jeff Sessions) (“[C]ontrary to what has been suggested ... Federal courts have a long record of protecting workers in employment class actions. Congress has passed strong laws, such as title VII, that were specifically crafted to give workers access to Federal courts so they could bring employment discrimination cases in a fair forum. We have always believed Federal court is a fair, objective forum for people who have been discriminated against, whether they claim employment rights or civil rights. As a result, Federal courts already have jurisdiction over most employment discrimination and pension claims, and their record is in sharp contrast to courts such as in Madison County, IL and Jefferson County, TX.... [Therefore,] contrary to the position of the amendment’s proponents, [CAFA] will not impose new, burdensome and unnecessary requirements on civil rights litigants and the federal courts.... This bill protects the rights of civil rights plaintiffs.”).

<sup>699</sup> See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.11 (1981) (“Prior to the advent of interest analysis in the state courts as the ‘dominant mode of analysis in modern choice of law theory,’ ... the prevailing choice-of-law methodology focused on the jurisdiction where a particular event occurred.... For example, in cases characterized as contract cases, the law of the place of contracting controlled the determination of such issues as capacity, fraud, consideration, duty, performance, and the like.”); *Le Roy v. Beard*, 49 U.S. 451, 464 (1850) (“[I]n the state of New York it has been repeatedly held ... that ... such device, without a wafer or wax, are not to be deemed a seal, and that the proper form of action must be such as is practi[c]ed on an unsealed instrument in the State where the suit is instituted ....”).

<sup>700</sup> *Ormsby v. Chase*, 290 U.S. 387 (1933).

place where the tort occurred before determining whether to award damages as well as other common-law and equitable remedies.<sup>701</sup>

Therefore, citing and fiercely embracing those choice of law principles,<sup>702</sup> CAFA's opponents had a major concern. They did not want federal district court judges to ignore unwittingly, or wittingly, the "law of the place" rules when class members filed post-CAFA breach-of-contract and tort-based class actions against multinational corporations, insurers and other defendants in federal courts.<sup>703</sup> In fact, after carefully reading the proposed legislation, many state attorneys general opposed it and concluded:

[Class action reforms] would vastly expand federal diversity jurisdiction, and ... [cause] most class actions [to be] filed in or removed to federal court. This transfer of jurisdiction in cases raising questions of state law will inappropriately usurp the primary role of state courts in developing their own state tort and contract laws, and will impair [state courts'] ability to establish consistent interpretations of those laws.<sup>704</sup>

However, a majority of CAFA's supporters stressed that these additional choice of law concerns were unfounded.<sup>705</sup> Mirroring the sentiments of most reformers, one Senator stated:

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<sup>701</sup> *Id.* at 388 ("[T]he law of the place of the wrong determines whether the claim for damages survives the death of the wrongdoer.") (citation omitted); *see also Hague*, 449 U.S. at 308–09 n.11 ("In the tort context, the law of the place of the wrong usually governed traditional choice-of-law analysis.").

<sup>702</sup> *See, e.g.*, 151 CONG. REC. 1818 (statement of Sen. Jeff Bingaman) ("Under current doctrines, federal courts hearing state law based claims, must use the 'choice-of-law' rule of the state in which the federal district court sits. These procedural rules vary among states, but many provide that the federal court should apply the substantive law of a home state of the plaintiff, or the law of the state where the harm occurred. In a nationwide consumer class action, such a rule would lead the court to apply to each class member's claim the law of the state in which the class member lives, or lived at the time the harm occurred." (quoting a passage from a letter submitted by Arthur Miller, Harvard's Bruce Bromley Professor of Law)).

<sup>703</sup> *Id.*

<sup>704</sup> *Id.* at 1649 (Letter to the Majority and Minority Leaders from Fifteen State Attorneys General).

<sup>705</sup> *See, e.g., id.* at 2092 (statement of Sen. Christopher Dodd) ("Opponents of [CAFA] claim that, by in any way altering the procedural rules governing class actions, substantive rights will be denied. However, this argument is trumped by a little document called the U.S. Constitution.").

[These reforms do] not alter substantive law...or...affect any injured individual's right to seek redress or to obtain damages. It does not limit damages .... [and] does not impose stricter pleading requirements.... Federal courts will continue to apply the appropriate State or States' laws in adjudicating a class action suit.<sup>706</sup>

On the other hand, a different reformer's cautionary remarks reinforced anti-reformers' general concerns. He stressed that when federal courts hear and decide class actions of national importance, a rational desire to achieve “efficient federalism” entails allowing federal judges to sort through complex substantive questions of law and apply “law of the place” rules if the application “would make sense.”<sup>707</sup>

Finally, state attorneys general have successfully litigated illegal-trade-practices class actions in state courts to protect consumers' rights. For example, states have filed “enforcement actions on behalf of consumers against large, often foreign-owned, drug companies for overcharges and market manipulations that illegally raised the costs of certain prescription drugs.”<sup>708</sup> Therefore, anti-reformers have argued that class action reforms would terminate or undermine the power of state attorneys general to litigate antitrust class actions in state courts.<sup>709</sup> But class action reformers

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<sup>706</sup> *Id.* at 1670 (statement of Sen. Sam Brownback).

<sup>707</sup> *Cf. id.* at 2641 (statement of Rep. Rick Boucher) (“Suppose that a California State court class action were filed against a California pharmaceutical drug company on behalf of a proposed class of 60 percent California residents and 40 percent Nevada residents alleging harmful side effects attributed to a drug sold nationwide. In such a case, it would make sense to leave the matter in Federal court. After all, the State laws that would apply in all of these cases would vary, depending on where the drug was prescribed and purchased.... [A]llowing a single Federal court to sort out such issues and handle the balance of the litigation would make sense both from added efficiency and a federalism standpoint.”).

<sup>708</sup> 151 CONG. REC. 2650 (Letter to the Majority and Minority Leaders from National Association of Attorneys General); *see id.* (“Such cases have resulted in recoveries of approximately 235 million dollars, the majority of which is earmarked for consumer restitution.... This often meant several hundred dollars going back into the pockets of those consumers who can least afford to be victimized by illegal trade practices, senior citizens living on fixed incomes and the working poor who cannot afford insurance.”).

<sup>709</sup> *See id.* (Letter to the Majority and Minority Leaders from National Association of Attorneys General) (“[We support the bipartisan amendment's], clarifying that [CAFA] does not apply to, and would have no effect on, actions brought by any State Attorney General on behalf of his or her respective state or its citizens. As Attorneys General, we frequently investigate and bring actions against defendants who have caused harm to our citizens. These cases are usually brought pursuant to the Attorney General's *parens patriae* authority under our respective consumer protection and antitrust statutes.... It is our concern that certain provisions of [CAFA] might be misinterpreted to hamper the ability of the Attorneys General to bring such actions .... We encourage you to support

have insisted that CAFA would not interfere with the ability of state attorneys general to enforce their respective antitrust statutes.<sup>710</sup> In the end, the state attorneys' general amendment to exempt state antitrust class actions under CAFA failed.<sup>711</sup>

Breach-of-contract, tort-based, consumer-protection, civil-rights, anti-trust, and securities causes of action—these theories of recovery have presented choice of law problems for both complainants and defendants who litigated class actions in state and federal courts. However, in the wash of CAFA's new removal provisions, it would be difficult to measure at this point whether these specific choice of law challenges will substantially increase or decrease defendants' or complainants' likelihood of winning or losing class actions in federal courts.<sup>712</sup>

Still, consider the statistical findings in Table 4. They present a picture of the relationship between various theories of recovery and the disposi-

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the ... amendment [that exempts] all actions brought by State Attorneys General from the provisions [in CAFA]."); *id.* at 2086 (statement of Sen. Hillary Clinton) ("[T]he National Conference of State Legislatures, NCSL, has noted ... its strong opposition to [CAFA], [because] the legislation 'sends a disturbing message to the American people that state court systems are ... inferior or untrustworthy.' The NCSL [also concluded] ... 'that state laws in the areas of consumer protection and antitrust, which were passed to protect the citizens of a particular state against fraudulent or illegal activities, will almost never be heard in state courts. Ironically, state courts, whose sole purpose is to interpret state laws, will be bypassed and the federal judiciary will be asked to render judgment in those cases.' Although bill proponents have sometimes suggested the contrary, make no mistake: if enacted, [CAFA] will [cause] the majority of class action lawsuits [to be] transferred from our state to Federal courts, [and will] ... terminate some class action lawsuits ....").

<sup>710</sup> See *id.* at 2077 (statement of Sen. Lindsey Graham) ("Valid trade secrets and proprietary information—sensitive information that goes to the heart of a company being able to compete in the market place should and will be protected.... [T]hey have a right to protect valid trade secrets—patents and other proprietary information.... [W]e have ... tried to balance the legitimate interests of companies, who we want to remain strong competitors in the marketplace, with the public's interest in disclosing potentially harmful products or practices.").

<sup>711</sup> See *id.* at 2083 (statement of Sen. Carl Levin) ("[F]orty seven attorneys general ... expressed concern that [CAFA] could limit their powers to investigate and bring [anti-trust class] actions in their State courts against defendants who have caused harm to their citizens. The attorneys general supported an amendment ... that would have exempted all [class] actions brought by State Attorneys General from the [CAFA] provisions stating, 'It is important to all of our constituents, but especially to the poor, elderly and disabled, that the provisions of the act not be misconstrued and that we maintain the enforcement authority needed to protect them from illegal practices.' The ... amendment was defeated.").

<sup>712</sup> As of this writing, CAFA has been enacted only six years; thus there are too few CAFA-related decisions to do a sound empirical study.

tion of class actions in state and federal courts of appeals.<sup>713</sup> More importantly, the reported percentages strongly suggest that both class action reformers and anti-reformers have sound reasons to be concerned about how federal and state courts will interpret and apply choice of law rules after CAFA.<sup>714</sup>

TABLE 4  
CLASS MEMBERS’ WIN-LOSS RATIOS AGAINST NATIONAL AND  
MULTINATIONAL CORPORATIONS AND INSURERS IN STATE AND FEDERAL  
COURTS OF APPEALS

Variables	Class Members’ Win/Loss Ratios Against National & Multinational Corporations & Insurers				Class Members’ Win/Loss Ratios ONLY Against National & Multinational Insurers			
	State Courts		Federal Courts		State Courts		Federal Courts	
	Win/Loss Ratios	(N = 295)	Win/Loss Ratios	(N = 193)	Win/Loss Ratios	(N = 201)	Win/Loss Ratios	(N = 99)
<b>Class Members’ Claims:</b>								
Breach-of-Contract	0.325 / 0.675	(N = 83)**	0.259 / 0.741	(N = 24)	0.333 / 0.667	(N = 72)*	0.250 / 0.750	(N = 16)
Common-Law Torts	0.667 / 0.333	(N = 48)**	0.333 / 0.667	(N = 21)	0.675 / 0.325	(N = 40)*	0.154 / 0.846	(N = 13)
Consumer-Protection	0.432 / 0.568	(N = 118)**	0.377 / 0.623	(N = 77)	0.405 / 0.595	(N = 79)*	0.263 / 0.737	(N = 38)
Civil-Rights	0.577 / 0.423	(N = 26)**	0.606 / 0.394	(N = 33)	0.500 / 0.500	(N = 2)*	0.667 / 0.333	(N = 9)
Securities	0.444 / 0.556	(N = 9)**	0.412 / 0.588	(N = 17)	0.333 / 0.667	(N = 6)*	0.357 / 0.643	(N = 14)
Antitrust	0.636 / 0.364	(N = 11)**	0.556 / 0.444	(N = 18)	0.500 / 0.500	(N = 2)*	0.444 / 0.556	(N = 9)

\*\* Chi square statistic = 17.4931, *df* = 5, *p* = 0.004  
\* Chi square statistic = 13.0229, *df* = 5, *p* = 0.02

First, it is important to note that two broad subheadings appear in Table 4. One is labeled “Class Members’ Win/Loss Ratios Against National & Multinational Corporations and Insurers” (corporations and insurers cases).<sup>715</sup> The other subheading is labeled “Class Members’ Win/Loss Ratios ONLY Against National & Multinational Insurers” (insurers only cases).<sup>716</sup> The reason for constructing two broad subcategories is not complicated. Depending on the types of insurance contracts, insurers have different contractual obligations.<sup>717</sup> Here is a pertinent example: under residential and commercial property insurance contracts, property insurers promise to pay certain proceeds or to indemnify property owners when

<sup>713</sup> See *infra* Table 4. A copy of the author’s database is available at the office of the *William & Mary Business Law Review*.

<sup>714</sup> See *infra* Table 4.

<sup>715</sup> See *supra* Table 4.

<sup>716</sup> See *supra* Table 4.

<sup>717</sup> See *infra* notes 718–23.

“covered perils” produce tangible and intangible losses.<sup>718</sup> If the property insurers breach those first-party agreements, the insured property owners may file first-party, direct actions—including class actions—against the insurers.<sup>719</sup>

Here is another example: liability insurance contracts are essentially third-party contracts, since insureds purchase those contracts for the benefit of third-party victims.<sup>720</sup> In addition, under a variety of liability policies, multinational insurers promise to pay and/or settle third-party victims’ claims and lawsuits.<sup>721</sup> But even more significantly, liability insurance contracts generally have duty-to-defend causes under which insurers promise to defend insureds against third-party victims’ lawsuits.<sup>722</sup> However, when liability insurers breach duty-to-defend clauses, the insureds may also file first-party, direct actions—including class actions—against the insurers.<sup>723</sup> In Table 4, the “Insurers’ Only Cases” comprise legal disputes like those appearing in the two examples.

Case law is also replete with excellent examples of multinational liability insurers’ honoring their contractual obligations when third-party victims sue insureds in state and federal courts.<sup>724</sup> Fairly often, multinational liability insurers enthusiastically provide a legal defense for their insured, multinational corporations and businesses.<sup>725</sup> And in those situa-

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<sup>718</sup> See *Warrilow v. Norrell*, 791 S.W.2d 515, 527 (Tex. App. 1989) (explaining that to establish “coverage” under a property-insurance contract, one must prove that a covered peril—rather than an excluded peril—caused the loss); *id.* (“Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability.” (quoting *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (Cal. 1989))); *id.* (“Coverage in a property policy is commonly provided by reference to causation, such as ‘loss caused by ...’ certain enumerated forces.... It is precisely these physical forces that bring about the loss.” (citing *Garvey*, 770 P.2d at 710)); *id.* (“In Texas, if one force is covered and one force is excluded, the insured must show that the property damage was caused solely by the insured force, or he must separate the damage caused by the insured peril from that caused by the excluded peril.” (citing *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971))).

<sup>719</sup> Rice, *supra* note 266, at 346–47.

<sup>720</sup> See *id.* at 346 n.87 (“Liability insurance is purchased primarily to recompense injured third parties. Therefore, one would expect such parties to have little difficulty obtaining the right to commence direct-action suits against liability carriers for extracontractual damages.”).

<sup>721</sup> *Id.* at 346.

<sup>722</sup> See WILLY E. RICE, CONSUMER LITIGATION AND INSURANCE DEFENSE 573–75 (2011) (presenting a nutshell discussion of liability insurance contracts and insurers’ various obligations under duty-to-defend doctrines in multiple jurisdictions).

<sup>723</sup> *Id.*

<sup>724</sup> See *id.*

<sup>725</sup> *Id.*



tions, one can find allegedly third-party victims listing insurers and insured corporate entities as joint defendants.<sup>726</sup> Those lawsuits are usually called “third-party actions.”<sup>727</sup> In Table 4, conflicts fitting this latter description are categorized as “Corporations and Insurers Cases.”<sup>728</sup>

There is, however, one final important point: regardless of whether complainants sue insurance companies and corporations individually or jointly, complainants’ theories of recovery or claims are typically the following: breach-of-contract, tort-based claims, consumer-protection actions, civil-rights claims, antitrust actions, and securities-violation causes of action.<sup>729</sup> And these theories of recovery appear whether the lawsuits are first-party or third-party actions.<sup>730</sup>

So, at this point, it is appropriate to ask: does Table 4 present any statistical findings that should generate or elevate choice of law concerns among class action reformers and anti-reformers? First, reformers believe that removing more civil-rights class actions from allegedly “biased” state courts to professedly “more competent and impartial” federal courts will significantly improve multinational corporations’ and insurers’ likelihoods of winning civil-rights disputes in federal courts.<sup>731</sup> The percentages in Table 4, however, suggest otherwise.<sup>732</sup> Class members are substantially more likely to win or prevail in the overwhelming majority of civil-rights cases.<sup>733</sup> And those results appear repeatedly, regardless of (1) whether class members filed civil-rights actions in state or federal courts, or (2) whether civil-rights complaints named corporations and/or insurers as defendants in the class actions.<sup>734</sup> The complainants’ “win” percentages/ratios across the table are 0.557, 0.606, 0.500, and 0.667, respectively.<sup>735</sup>

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<sup>726</sup> See Willy E. Rice, *The Court of Appeals for the Fifth Circuit 2004–2005 Disposition of Insurance Decisions: A Survey and Statistical Review*, 38 TEX. TECH. L. REV. 821, 878 nn.477–80 (2006) (discussing third parties’ right to sue the original parties who formed a contract).

<sup>727</sup> See RICE, *supra* note 722.

<sup>728</sup> See *supra* Table 4.

<sup>729</sup> See *supra* Table 4.

<sup>730</sup> See *infra* Appendix.

<sup>731</sup> Cf. 151 CONG. REC. 1646 (2005) (statement of Sen. Ted Kennedy) (“[Under CAFA], a corporate defendant with headquarters outside [of a] State can move State class action cases, including civil rights cases and worker right cases, into Federal court, even if all the underlying facts in the case happened in a single State.”); see also *supra* note 698 and accompanying text.

<sup>732</sup> See *supra* Table 4.

<sup>733</sup> See *supra* Table 4.

<sup>734</sup> See *supra* Table 4.

<sup>735</sup> See *supra* Table 4.

What have been corporations' and insurers' successes as defendants in antitrust class actions? Again, review the win/loss ratios in Table 4 under "Corporations and Insurers Cases." The reported ratios reveal that, in both allegedly "biased" state courts and in supposedly "unprejudiced" federal courts, class members are substantially more likely to win antitrust class actions against the corporations and insurers.<sup>736</sup> The class members' "win" ratios in state and federal appellate courts are 0.636 and 0.556 respectively.<sup>737</sup> Furthermore, among "Insurers Only Cases," class members won half (0.500) of antitrust class actions that were filed against insurers in state courts.<sup>738</sup> On the other hand, national and multinational insurers were significantly more likely to win a majority (0.556) of federal antitrust class actions.<sup>739</sup>

Arguably, this latter finding could partially explain insurers' general perception: unlike state courts, federal courts are impartial forums; thus, insurers have a greater chance of defending themselves and their insured corporate clients against a variety of class actions, including antitrust actions.<sup>740</sup> But if that conclusion is correct, it underscores and possibly justifies anti-reformers' concerns about class action reforms generally, and the previously discussed choice of law problems that class members might face in the wake of CAFA. To appreciate why anti-reformers' concerns might be warranted, consider the first row of statistics in Table 4.

Those ratios show the dispositions of class actions involving breach-of-contract claims and the general finding is clear: insurers and corporations are overwhelmingly more likely to prevail in breach-of-contract class actions.<sup>741</sup> More specifically, corporate defendants "win" repeatedly and consistently, regardless of (1) whether the breach-of-contract complaints named corporations or insurers as class action defendants, or (2) whether class members appealed breach-of-contract actions to state or federal appellate courts.<sup>742</sup> Conversely, the meager "win" ratios for class members across all categories are just 0.325, 0.259, 0.333, and 0.250, respectively.<sup>743</sup>

Again, it is worth repeating class action reformers' and corporate defendants' general assertion that removing allegedly "class actions of na-

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<sup>736</sup> See *supra* Table 4.

<sup>737</sup> See *supra* Table 4.

<sup>738</sup> See *supra* Table 4.

<sup>739</sup> See *supra* Table 4.

<sup>740</sup> See *supra* Table 4.

<sup>741</sup> See *supra* Table 4.

<sup>742</sup> See *supra* Table 4.

<sup>743</sup> See *supra* Table 4.

tional importance” to federal courts is warranted because state court judges are (1) inherently “biased” against out-of-state corporate defendants, and (2) significantly more likely to issue unfair and incompetent class action rulings.<sup>744</sup> But the author invites the reader to inspect the third and fifth rows of ratios in Table 4. Those statistics do not support class action reformers’ arguments.<sup>745</sup> First, consider the coefficients in the third row, which illustrate the disposition of consumer-protection class actions.<sup>746</sup> Again, the statistically significant findings are consistent.<sup>747</sup> Class action defendants are substantially more likely to win the greater majority of consumer-protection class actions in courts of appeals.<sup>748</sup>

More precisely, corporate defendants are significantly more likely to win consumer-protection, class action lawsuits regardless of (1) whether class members’ consumer-protection pleadings identified corporations or insurers as defendants, or (2) whether class members appealed consumer-protection class actions to state or federal appellate courts.<sup>749</sup> The corresponding ratios for corporate defendants’ extremely greater likelihood of winning consumer-protection lawsuits—across all categories in the third row—are 0.568, 0.623, 0.595, and 0.737, respectively.<sup>750</sup>

The fairly new class action removal provisions under CAFA do not apply to class actions that involve corporate defendants’ alleged securities violations.<sup>751</sup> Nevertheless, a careful review of the statistics appearing in Table 4’s fifth row also undermine class action reformers’ and corporate defendants’ generally negative perceptions about state judges, and about the perceived administration of justice in state courts.<sup>752</sup> An examination of the ratios illustrating the disposition of securities-violation class actions reveals that corporations and insurers are statistically and substantially more likely to win the greater proportion of securities-based class actions in appellate courts.<sup>753</sup> And, like earlier findings, class action defendants

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<sup>744</sup> See *supra* Part V.B.

<sup>745</sup> See *supra* Table 4.

<sup>746</sup> See *supra* Table 4.

<sup>747</sup> See *supra* Table 4.

<sup>748</sup> See *supra* Table 4.

<sup>749</sup> See *supra* Table 4.

<sup>750</sup> See *supra* Table 4.

<sup>751</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5(d)(1), 119 Stat. 4, 13 (“EXCEPTION.—This section shall not apply to any class action that solely involves a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E)).”).

<sup>752</sup> See *supra* Table 4.

<sup>753</sup> See *supra* Table 4.

are more likely to win: (1) when the securities-violation pleadings identified corporations or insurers as defendants, and (2) when insurers and/or multinational corporations defended themselves in state or federal courts of appeals.<sup>754</sup> The “win” ratios for securities-based class action defendants across all categories are 0.556, 0.588, 0.667, and 0.643 respectively.<sup>755</sup>

Before leaving Table 4, one final, important observation is warranted. In the wake of class action reforms and if certain conditions are satisfied, CAFA allows the following: a corporate defendant may assert that a “mass action” is essentially a class action and remove the state law lawsuit from a supposedly “anti-corporate” state court to a purportedly “impartial” federal district court.<sup>756</sup> Under CAFA, a civil action qualifies as a “mass action” if 100 or more persons present claims that have common questions of law and fact, and each person wants monetary relief.<sup>757</sup> But, historically, using the 100-or-more-persons-claim definition, mass-tort actions have not been viewed as class actions or mass actions.<sup>758</sup> Arguably, CAFA’s definition overturns conventional wisdom and muddles the definition of mass torts.<sup>759</sup>

In fact, before and in the wake of CAFA, anti-reformers asserted strongly that “mass action” is simply a thinly disguised term for “mass

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<sup>754</sup> See *supra* Table 4.

<sup>755</sup> See *supra* Table 4.

<sup>756</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a)(11)(A), 119 Stat. 4, 11. Presently, citing CAFA’s mass action removal provisions, federal courts may treat many state mass-tort actions as if they were class actions. See, e.g., 151 CONG. REC. 2657 (2005) (statement of Rep. John Conyers) (“[T]his substitute [amendment] is the superior piece of legislation .... The substitute is much better .... [because] we exclude non-class action cases involving physical injuries. [CAFA] applies not only to class actions, but also to mass torts. The Democratic substitute removes the mass tort language.”).

<sup>757</sup> Class Action Fairness Act of 2005, § 4(a)(11)(B)(i), 119 Stat. at 11.

<sup>758</sup> Cf. 151 CONG. REC. 2090 (statement of Sen. Patrick Leahy) (“Anyone who reads [CAFA] will notice that ... it affects more than just class actions. Individual actions, consolidated by state courts for efficiency purposes, are not class actions. Despite the fact that a similar provision was unanimously struck from the bill during the last Congress, mass actions reappeared in this bill this Congress. Federalizing these individual cases will no doubt delay, and possibly deny, justice for victims suffering real injuries.”).

<sup>759</sup> See *id.* at 2082 (statement of Sen. Dick Durbin) (“Mass torts are large scale personal injury cases that result from accidents, environmental disasters, or dangerous drugs that are widely sold. Cases like Vioxx ... and cases arising from asbestos exposure are examples of mass torts. These personal injury claims are usually based on State laws, and almost every State has well established rules of procedure to allow their State courts to customize the needs of their litigants in these complex cases.”).

torts.”<sup>760</sup> And from anti-reformers’ perspective, class action reformers and multinational corporations want to federalize all state mass-torts and personal-injury cases.<sup>761</sup> Even more pointedly, a fairly large consortium of anti-reformers insists that CAFA’s removal provisions are:

Patently unfair to citizens harmed by toxic spills, contaminated drinking water, polluted air and other environmental hazards .... [CAFA] would allow corporate defendants in many ... “mass tort” environmental cases to remove these kinds of state environmental matters from state court to federal court, placing the cases in a forum that could be more costly, more time-consuming, and disadvantageous [for the victims of] toxic pollution.<sup>762</sup>

On the other hand, class action reformers have been just as adamant, insisting that “[m]ass torts and mass actions are not the same.”<sup>763</sup> But even more ardent class action reformers have stressed that mass-tort actions are indeed nothing less than nationwide class actions.<sup>764</sup> Thus, according to the more adamant reformers, mass-tort actions—like nationwide class actions generally—should be removed to and litigated in federal courts, because (1) mass-tort actions are abusive,<sup>765</sup> (2) they allow unethical law-

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<sup>760</sup> See, e.g., *id.* at 1660 (statement of Sen. Dick Durbin) (“[S]upporters of [CAFA] claim that mass actions are not the same as mass torts and ... they have no desire to affect mass tort cases. I know that is their position, but it is not what [CAFA] says.”).

<sup>761</sup> See, e.g., *id.* at 2648 (statement of Rep. Sheila Jackson-Lee) (“This class action lawsuit legislation ... is excessive and overreaching.... [It] wants to federalize mass torts.”); *id.* at 1660 (statement of Sen. Dick Durbin) (“If the goal is to federalize all state personal injury cases, supporters should be open about it and say it publicly.”).

<sup>762</sup> *Id.* at 2649 (statements from a letter submitted by S. Elizabeth Birnbaum, Vice President for Government, American Rivers, and various other environmental organizations).

<sup>763</sup> See *id.* at 2082 (statement of Sen. Dick Durbin) (quoting comment of Sen. Trent Lott) (“The phrase ‘mass torts’ refers to a situation in which many persons are injured by the same underlying cause, such as a single explosion, a series of event, or exposure to a particular product. In contrast, the phrase ‘mass action’ refers to a specific type of lawsuit in which a large number of plaintiffs seek to have all their claims adjudicated in one combined trial. Mass actions are basically disguised class actions.”); *id.* at 2649.

<sup>764</sup> 151 CONG. REC. 2642 (statement of Rep. James Sensenbrenner) (“The mass action provision was included in [CAFA] because mass actions are really class actions in disguise. They involve an element of people who want their claims adjudicated together, and they often result in the same abuses as class actions. In fact, sometimes the abuses are even worse because the lawyers seek to join claims that have little to do with each other and confuse a jury into awarding millions of dollars to individuals who have suffered no real injury.”).

<sup>765</sup> See, e.g., *id.* at 1826 (statement of Sen. Orrin Hatch) (“Abuse of the class action system has even become the inspiration for popular literature. In 2003, ... John Grisham released a book entitled ‘The King of Torts.’ Grisham’s novel takes its reader into the

yers to game the system to secure hefty attorneys' fees,<sup>766</sup> and (3) they undermine the "economic competitiveness" of national and multinational corporations.<sup>767</sup>

Therefore, against the backdrop of corporate defendants' newly acquired right to remove larger numbers of purely state substantive law mass actions from state courts to federal courts, there is one additional pressing question: Are states' righters and anti-reformers' general fears about corporate defendants abusing that right warranted? Or, stated differently, are corporate defendants more likely to win greater numbers of class action lawsuits if state law mass actions or mass-tort actions satisfy the 100-or-more-persons class action rule and are removed from state courts to federal courts? Arguably, without considering any other variables, the remaining statistics in Table 4 provide some insight.

Once more, in the table, class members' and class action defendants' win/loss ratios appear under two broad categories—"Corporations and Insurers Cases" and "Insurers Only Cases."<sup>768</sup> Now, examine the second row of ratios. Those coefficients demonstrate the dispositions of tort-based class actions, or class actions in which class members' theory of recovery sounded in tort.<sup>769</sup> The results are mixed, which probably explains class action reformers' and anti-reformers' passion about this issue and their respective desires to litigate tort-based, personal-injury lawsuits either in state or federal courts.<sup>770</sup> First, class members are substantially more likely to win tort-based class actions in state appellate courts, regardless of whether complainants sued multinational corporations and insurers jointly or individually.<sup>771</sup> The class members' "win" ratios in state appellate courts are 0.667 and 0.675, respectively.<sup>772</sup>

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world of the mass tort/class action lawyer where clients are treated like chattel and bargaining chips.... The end game is not the pursuit of justice for the class members and clients, but in the pursuit of a hefty attorney's fee. Although Grisham's book is intended as fiction, it is hard to distinguish it from the facts of our broken class action system.").

<sup>766</sup> *Id.*

<sup>767</sup> *Id.* at 2091 (statement of Sen. John Cornyn) ("I have spoken previously on this floor about my concerns that this legislation does not go far enough to address the scandal of litigation abuse that plagues our civil justice system. I stand by those concerns today. We can and should do more to reduce the burden of frivolous, expensive litigation. Our Nation's economic competitiveness in the 21st century depends on it.").

<sup>768</sup> See *supra* Table 4.

<sup>769</sup> See *supra* Table 4.

<sup>770</sup> See *supra* Table 4.

<sup>771</sup> See *supra* Table 4.

<sup>772</sup> See *supra* Table 4.



In contrast, corporate defendants are substantially more likely to win tort-based class actions when those claims are litigated in federal courts of appeals.<sup>773</sup> And corporate defendants won large percentages of tort-based, federal class actions regardless of whether class members sued multinational corporations and insurers jointly or individually.<sup>774</sup> Corporate defendants’ “win” ratios in federal courts are 66.7% and 84.6%, respectively.<sup>775</sup>

To conclude the discussion of the results in Table 4, the brief comments of a class action reformer and anti-reformer are worth restating. The proponent stressed: “The class action system ... is broken. Over the past decade, class action lawsuits have grown by over 1,000 percent nationwide. This extraordinary increase has [produced] ... claims that are often unjust. [Class actions involving multistate] plaintiffs and defendants ... are tried in small State courts with known biases.”<sup>776</sup> But the anti-reformer asserted:

[T]he business community has worked ... long and ... hard to remove the rights of consumers and citizens to sue in their own State courts.... The businesses know they can win more class action cases in Federal courts than they could ever win in State courts. That is what this whole [CAFA] debate is about.<sup>777</sup>

Which position is correct? Based on the limited findings in Table 4, the anti-reformers’ position is only partially correct.<sup>778</sup> It is true: multinational corporations, insurers, and other corporate defendants—rather than class action complainants—are more likely to win class actions by substantially larger margins in federal courts of appeals.<sup>779</sup> There is, however, an even more surprising finding: multinational corporations and insurers are also more likely to win class actions by substantial margins in state appellate courts.<sup>780</sup> This latter, unexpected finding seriously challenges, and even negates, the accuracy of class action reformers’ unrelenting and previously discussed assertions that class action reforms are needed, because (1) class action systems in state courts are broken, (2) state court judges have known biases against out-of-state corporate defendants, and

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<sup>773</sup> See *supra* Table 4.

<sup>774</sup> See *supra* Table 4.

<sup>775</sup> See *supra* Table 4.

<sup>776</sup> 151 CONG. REC. 2084 (2005) (statement of Sen. Mike Enzi).

<sup>777</sup> *Id.* at 2082 (statement of Sen. Dick Durbin).

<sup>778</sup> See *supra* Table 4.

<sup>779</sup> See *supra* Table 4.

<sup>780</sup> See *supra* Table 4.

(3) anti-corporate biases prevent corporate defendants from winning a significant number of class actions in state courts.

*E. Two-Stage Multivariate Probit Analysis of the Relationship Between Litigants' Characteristics and the Disposition of Class Actions in State and Federal Courts of Appeals*

The discussion above revealed several broad, statistically significant findings: (1) litigants' status—class members versus class defendants—influences who is more likely to win an overwhelming majority of class actions in both state and federal courts, (2) state and federal courts' geographic locations influence whether class members or defendants win a majority of class actions, and (3) class members' theories of recovery—choice of substantive laws—significantly influence whether class complainants win a majority of class actions in state or federal courts.<sup>781</sup>

Certainly, these broad findings preclude anyone from establishing persuasively that allegedly “biased” judicial rulings determine whether plaintiffs or defendants will win a majority of class actions in state or federal courts. As the author has explained on other occasions in published law review articles, to determine whether there is evidence of “judicial bias,” several factors must be weighed.<sup>782</sup> But even more importantly, one must address forthrightly questions about the quality of the sample data—whether the cases appearing in regional law reporters actually reflect what is occurring in courts, factually and generally.<sup>783</sup> Therefore, to increase the likelihood of one's conducting a sound study, an investigator must (1) employ a procedure that generates more “powerful” inferential statistics and coefficients than simple percentages, (2) measure the unique as well as simultaneous effects of legal and extralegal variables on the disposition of class actions, and (3) test for “selectivity bias” in the sample data.<sup>784</sup>

Why test for “selectivity bias” in sample data? Arguably, appellate courts' rulings are more important and persuasive, since those rulings are

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<sup>781</sup> See *supra* Table 4.

<sup>782</sup> See Rice, *supra* note 296, at 1208–09 (discussing the inherent problems with using only reported cases and simple percentages to make inferences). To be sure, there are “full” judicial decisions which are not published in various federal and state reporters. However, to address that limitation in part, the present study includes both cases appearing in the reporters as well as in multiple online state and federal databases.

<sup>783</sup> See Rice, *supra* note 296, at 1208–09.

<sup>784</sup> In several published articles, the author has discussed “selectivity bias,” the problems that it generates, and the test for it in sample data. See Willy E. Rice, *Insurance Contracts and Judicial Decisions over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900–2000*, 35 TORT & INS. L. J. 995, 1088–89 nn.431–32 (2000); Rice, *supra* note 296, at 1209 n.386; Rice, *supra* note 266, at 371–75 nn.157–59 (1992).

significantly more likely to be “final decisions” than federal district courts or state trial courts’ rulings. However, after state trial courts and federal district courts issue unfavorable class action rulings or judgments, some class plaintiffs and defendants accept those decisions and choose not to seek appellate review.<sup>785</sup> Other class litigants, however, refuse to accept lower courts’ adverse judgments, and the latter litigants decide to challenge unfavorable outcomes in either state or federal appellate courts.<sup>786</sup>

Therefore, the obvious question becomes whether any statistically significant difference exists between the attributes of litigants who choose to appeal adverse rulings and those who decide not to appeal. Of course, if there are significant differences between “appealers” and “nonappealers,” their dissimilar personal attributes—rather than “judicial bias” or other factors—might provide the better explanation of appealers’ propensity to win or lose more or less class actions in state and federal courts of appeals. Since the current sample contains some information about the attributes of class action “appealers” and “nonappealers,” a test for “selectivity bias” was warranted before attempting to measure whether “judicial bias” exists in state and federal appellate courts’ class action proceedings.<sup>787</sup>

Again, in this Part, the goal is to understand more fully why class action defendants and plaintiffs are likely to have relatively larger or smaller win/loss ratios in state or federal courts of appeals. And to help achieve that end, the present analysis employs a statistical procedure that allows one to measure unique as well as simultaneous effects of specific legal and extralegal variables—say, theories of recovery, types of defendants, and geographic locations of courts—on the disposition of class actions in state and federal appellate courts. Stated slightly differently, the challenge is to secure the specific individual, statistical effects (“explanations”) of certain variables on the courts’ dispositions of class actions, while controlling for and determining the multiple and simultaneous effects of other “presumed” random factors. Thus, to help increase the likelihood of achieving the stated ends, the author employed a multivariate, two-staged, probit procedure.<sup>788</sup>

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<sup>785</sup> See *supra* Table 2.

<sup>786</sup> See *supra* Table 3.

<sup>787</sup> See Rice, *supra* note 296, at 1209.

<sup>788</sup> In multiple published law review articles, the author has discussed and employed this statistical procedure to measure simultaneously unique and multiple effects of predictors on the disposition of court decisions. See Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts’ Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration and Insolvency Statutes with the McCarran-Ferguson Act—1941–1993*, 43 CATH. U. L. REV. 399, 445–49 nn.213–19 (1994); Rice, *supra* note 296 at 1088–94 nn.431–32, 1208–14 n.386–87; Willy E. Rice, *Judicial and Administrative Enforcement of Title VI, Title IX, and Section 504: A Pre- and Post-Grove City Analysis*, 5 REV. LITIG. 219, 287 nn.406–09 (1986) (using StataCorp’s STATA STATISTICAL SOFTWARE to analyze the data generally and to

Now, consider Table 5. It presents a multivariate probit analysis of the disposition of class actions in state and federal courts of appeals.<sup>789</sup> The table illustrates several distributions, probit values, and statistics for two multivariate models—Model A and Model B.<sup>790</sup>

TABLE 5  
THE MULTIVARIATE EFFECTS OF SELECTED VARIABLES ON LITIGANTS’  
DECISIONS TO COMMENCE CLASS ACTION LAWSUITS AND ON THE  
DISPOSITION OF THOSE ACTIONS IN STATE AND FEDERAL COURTS,  
1925–2011 (N = 2657)

MODEL A Selected Predictor Variables	Decision to Initiate Causes of Action to State and Federal Courts of Appeals (N = 1680)		Decision of Causes of Action in State and Federal Courts of Appeals (N = 1680)	
	Probit Values	Robust Std. Errors	Probit Values	Robust Std. Errors
Complainants’ Ethnicity:				
Anglo-American	-0.1370	0.0633*	-0.0070	0.0784
African-American	-0.1439	0.1320	-0.0466	0.1409
Circuits:				
Fourth Circuit	-0.0727	0.1196	0.1809	0.1544
Fifth Circuit	0.7487	0.0981***	0.2076	0.1668
Seventh Circuit	0.5443	0.0968***	0.2922	0.1355*
Eleventh Circuit	0.1619	0.0877	0.1559	0.0975
INTERACTION EFFECTS:				
ClassAction* STATE Courts	0.5255	0.0948***	0.3776	0.1374**
ClassAction* Insurers	0.5377	0.1144***	-0.0126	0.1865
ClassAction* Corporations	-0.0046	0.1376***	0.0742	0.1637
ClassAction* Contract Claims	-0.4806	0.1102***	-0.5145	0.1473***
ClassAction* Tort Claims	-0.3428	0.1096**	0.1736	0.1697
ClassAction* Civil-Rights Claims	-0.3743	0.1474**	0.0215	0.2071
ClassAction* Consumers’ Claims	-0.5587	0.1061***	-0.4006	0.1527**
ClassAction* Securities Claims	-0.6662	0.1359***	-0.3037	0.2378
ClassAction* Antitrust Claims	-0.4959	0.2467*	0.0509	0.3120
CONSTANT	0.3964	0.0500***	-0.3989	0.2258
Wald test for independent equations (“selectivity bias”): Chi square = 0.7900, <i>p</i> -value = 0.3743				
*** Absolute value of the <i>z</i> statistic is significant at <i>p</i> < 0.001				
** Absolute value of the <i>z</i> statistic is significant at <i>p</i> < 0.01				
* Absolute value of the <i>z</i> statistic is significant at <i>p</i> < 0.05				

compute the multivariate-probit coefficients in particular); Rice, *supra* note 266, at 369–77 nn.157–60.

<sup>789</sup> See *infra* Table 5. A copy of the author’s database is available at the office of the *William & Mary Business Law Review*.

<sup>790</sup> See *infra* Table 5.

TABLE 5 (CONTINUED)

MODEL B Selected Predictor Variables	Decision to Initiate Causes of Action to State and Federal Courts of Appeals (N = 1680)		Decision of Causes of Action in State and Federal Courts of Appeals (N = 1680)	
	Probit Values	Robust Std. Errors	Probit Values	Robust Std. Errors
<b>Complainants' Ethnicity:</b>				
Anglo-American	-0.2013	0.0633***	-0.0565	0.0757
African-American	-0.1655	0.1339	-0.0582	0.1373
<b>Circuits:</b>				
Fourth Circuit	-0.0512	0.1205	0.1867	0.1482
Fifth Circuit	0.7780	0.0982***	0.2554	0.1329*
Seventh Circuit	0.5634	0.0982***	0.3219	0.1129**
Eleventh Circuit	0.1803	0.0891*	0.1739	0.0944
<b>INTERACTION EFFECTS:</b>				
ClassAction* FEDERAL Courts	-0.8159	0.1007***	-0.6309	0.1512***
ClassAction* Insurers	0.8100	0.1145***	0.2013	0.1760
ClassAction* Corporations	0.2497	0.1375	0.2632	0.1596
ClassAction* Contract Claims	-0.2564	0.1036*	-0.3560	0.1261**
ClassAction* Tort Claims	0.1826	0.1072	0.2625	0.1426
ClassAction* Civil-Rights Claims	0.1584	0.1668	0.4205	0.1961*
ClassAction* Consumers' Claims	-0.2760	0.1103**	-0.2147	0.1268
ClassAction* Securities Claims	-0.1881	0.1519	0.0453	0.2132
ClassAction* Antitrust Claims	-0.1686	0.2563	0.3122	0.3014
<b>CONSTANT</b>	0.4584	0.0498***	-0.4146	0.1455**
Wald test for independent equations (“selectivity bias”): Chi square = 1.910, <i>p</i> -value = 0.1647				
*** Absolute value of the <i>z</i> statistic is significant at <i>p</i> < 0.001				
** Absolute value of the <i>z</i> statistic is significant at <i>p</i> < 0.01				
* Absolute value of the <i>z</i> statistic is significant at <i>p</i> < 0.05				

At the outset, it is important to note that the findings in Table 5 are based on a multivariate probit analysis of 1,680 cases rather than 2,657 cases—the total sample size.<sup>791</sup> Of the 1,680 cases, there are 824 state and federal class action decisions.<sup>792</sup> Of this latter number, litigants appealed 519 class actions to federal and state appellate courts, and they decided not to appeal 305 class actions.<sup>793</sup> The remaining 856 cases are non-class action decisions; they were also decided in state and federal lower courts.<sup>794</sup> Of the non-class action cases, litigants decided to appeal nearly seventy percent (69.3%) to appellate courts.<sup>795</sup> The remaining thirty percent (30.6%) were not appealed.<sup>796</sup> Of course, we do not know why some class action and non-class action litigants decided not to appeal adverse rulings or outcomes. To use statistical jargon, those cases were “unobserved” in either state or federal courts of appeals. Thus, their absence could be a source of “selectivity bias” when attempting to explain class action litigants’ wins/losses in state and federal courts of appeals.

Against the backdrop of those preliminary remarks, consider the variables and coefficients in Model A, which appears left of the vertical line in Table 5.<sup>797</sup> That model comprises three predictor variables, along with their subcategories: “Complainants’ Ethnicity” has two categories; “Circuits” has four categories; and, nine additional variables appear under the heading “Interaction Effects.”<sup>798</sup> To the right of the vertical line, Model B

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<sup>791</sup> See *infra* Table A. A copy of the author’s database is available at the office of the *William & Mary Business Law Review*. The purpose of the content analysis was to gather information about more than forty variables. Thus, if any case had a missing value on *any* variable, those cases were omitted to increase the likelihood of performing a sound multivariate probit analysis. Thus, the author omitted 977 cases.

<sup>792</sup> See *supra* Table 2.

<sup>793</sup> See *supra* Table 2.

<sup>794</sup> See *infra* Table A.

<sup>795</sup> See *infra* Table A.

<sup>796</sup> See *infra* Table A. These percentages are based on a review of the non-class action statistic in Table A.

<sup>797</sup> See *supra* Table 5.

<sup>798</sup> See, e.g., Pat K. Chew & Robert E. Kelly, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1139–40 n.122 (2009) (“By testing multiple variables simultaneously in this way, we can evaluate whether each characteristic has a statistically significant relationship with case outcome, while controlling for all others.... [Regressions] provide a unified framework in which to examine and test interaction effects, which indicate whether two (or more) variables together have an effect different than would be expected from knowledge of their individual effects alone.... Finally, [one may test] for statistical interactions between variables in ... regression models [to determine] ...whether the effect of each variable on case outcome depends in magnitude and/or direction of the value of another variable.”); see also Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Esti-*



appears.<sup>799</sup> Barring one exception, the variables in Model B are identical to those in Model A.<sup>800</sup> The one exception becomes readily apparent if the reader carefully reviews the nine interaction-effect variables in each model.<sup>801</sup> Even more to the point, the first “dummy” interaction-effect variable in Model A is “ClassAction\*STATE Courts.”<sup>802</sup> However, in Model B, the first “dummy” interaction-effect predictor is “ClassAction\*FEDERAL Courts.”<sup>803</sup>

Model A presents two distributions of probit values, along with their respective distributions of robust standard errors and z-statistics.<sup>804</sup> The various asterisks describe the probit values’ levels of statistical significance.<sup>805</sup> The “Interaction Effects” are simply “categorical dummy variables” which measure the independent effects of categories within certain predictor variables only among complainants who filed state law class actions. The probit values appearing under the caption “Decision to Initiate Causes of Action in State and Federal Courts of Appeals (N=1,680)” answer this inquiry: whether the multiple and simultaneous effects of “Complainants’ Ethnicity, Types of Circuits and Interaction Effects” significantly influenced litigants’ decisions to appeal their adverse rulings.<sup>806</sup>

The findings show that some of the probit values are statistically significant.<sup>807</sup> Thus, we may conclude that some of the factors influenced class action litigants’ decisions to appeal unfavorable lower court rulings to state and federal appeals courts.<sup>808</sup> Likewise, in Model B, many of the

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*mates of Its Cause*, 94 MICH. L. REV. 109, 115–16 n.27 (1995) (explaining and measuring the statistical effects of “dummy” interaction variables—zeros and ones—on sellers’ and buyers’ decisions and bargaining outcomes).

<sup>799</sup> See *supra* Table 5.

<sup>800</sup> See *supra* Table 5.

<sup>801</sup> See *supra* Table 5.

<sup>802</sup> See *supra* Table 5.

<sup>803</sup> See *supra* Table 5.

<sup>804</sup> See *supra* Table 5.

<sup>805</sup> See, e.g., Thomas J. Brennan, *What Happens After a Holiday?: Long-Term Effects of the Repatriation Provision of the AJCA*, 5 N.W.J.L. & SOC. POL’Y 1, 11–12 nn.34–35 (2010) (“Columns of the table represent separate regressions, and rows of the table represent variables corresponding to coefficients computed in the regressions.... The value reported for each regression and variable is the point estimate of the coefficient, and the value [to the right] is the robust standard error estimate.... In reports of regression results in this Article the notations \*, \*\*, and \*\*\* are used to indicate statistical significance at the levels of 10%, 5%, and 1%, respectively. These values are computed using the robust standard errors described in the above footnote.”).

<sup>806</sup> See *supra* Table 5.

<sup>807</sup> See *supra* Table 5.

<sup>808</sup> See *supra* Table 5.

same variables influenced litigants' decisions to appeal state trial courts' and federal district courts' adverse rulings.<sup>809</sup> In both models, the litigants' decision to appeal or not appeal can be explained by (1) knowing the complainants' ethnicity, (2) knowing the circuits in which the state and federal courts were located, and (3) knowing complainants' theories of recovery.<sup>810</sup>

Now, given those statistically significant findings, we must answer the most important question: whether "selectivity bias" appears in the data. Stated differently, is there any meaningful difference between litigants who decided to appeal adverse class action rulings and those litigants who decided not to appeal? This necessarily requires a researcher to "test" for similarities between, say, two equations—the two distributions of probit values within Model A as well as the two distributions of values within Model B. At the bottom of each model in Table 5, two Wald tests for independent equations suggest that no meaningful "selectivity bias" exists, because the respective Chi-square values are not statistically significant.<sup>811</sup> Therefore, in light of no apparent "self-selection bias," the important inquiry becomes whether the simultaneous and multiple effects of the predictors in Model A and Model B are significantly more or less likely to sway the dispositions of class action disputes in appellate courts. Put simply, the answer is yes.

Again, reconsider Model A and examine the probit values under the heading "Disposition of Causes of Action in State and Federal Courts of Appeals." Four predictors have statistically significant probit values.<sup>812</sup> The "Seventh Circuit" variable has a positive 0.2922 probit value.<sup>813</sup> It means that complainants generally are substantially more likely to prevail in all state and federal appellate courts that are located within the borders of the Seventh Circuit's jurisdiction.<sup>814</sup> And it is important to repeat that this applies to all complainants without controlling for whether they were class action or non-class action plaintiffs.<sup>815</sup>

However, the next three statistically significant probit values in Model A are class action-specific findings. Consider the first interaction-effect variable. The positive 0.3776 coefficient reveals that class action complainants are significantly more likely to win their cases in state courts of

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<sup>809</sup> See *supra* Table 5.

<sup>810</sup> See *supra* Table 5.

<sup>811</sup> See *supra* Table 5.

<sup>812</sup> See *supra* Table 5.

<sup>813</sup> See *supra* Table 5.

<sup>814</sup> See *supra* Table 5.

<sup>815</sup> See *supra* Table 5.

appeals.<sup>816</sup> On the other hand, the remaining two interaction-effect variables tell a different story.<sup>817</sup> Reviewing the “ClassAction\*Contracts” variable, the corresponding probit value under the column “Disposition of Causes of Action” is negative (-0.5145).<sup>818</sup> It strongly suggests that class action complainants are significantly more likely to lose on appeal when their theory of recovery sounds in contract.<sup>819</sup> Also, class action members are substantially more likely to lose when they sue corporate defendants for allegedly violating consumer protection laws.<sup>820</sup> The corresponding probit coefficient for the “ClassAction\*Consumers’ Claims” variable is negative (-0.4006).<sup>821</sup>

A review of the coefficients in Model B—under the caption “Disposition of Causes of Action in State and Federal Courts of Appeals”—reveals five variables with corresponding statistically significant probit values.<sup>822</sup> First, the positive 0.3219 probit value in Model B indicates that plaintiffs generally are substantially more likely to prevail in both state and federal courts of appeals located within the borders of the Seventh Circuit’s jurisdiction.<sup>823</sup> This finding is consistent with the finding in Model A.<sup>824</sup> But the positive and statistically significant 0.2554 probit value indicates that plaintiffs generally are also substantially more likely to prevail when they appeal their cases to state and federal appellate courts within the borders of the Fifth Circuit’s jurisdiction.<sup>825</sup> Of course, this latter finding is inconsistent with the Fifth-Circuit finding in Model A.<sup>826</sup>

The third statistically significant variable—“ClassAction\*Federal Courts”—in Model B confirms what class action reformers know as well as what anti-reformers and states’ righters fear: complainants who file state law class actions in federal courts of appeals are substantially more likely to lose than win.<sup>827</sup> The corresponding statistically significant and negative probit coefficient (-0.6309) supports this conclusion.<sup>828</sup> And to underscore this latter finding, one needs only to consider the next statisti-

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<sup>816</sup> See *supra* Table 5.

<sup>817</sup> See *supra* Table 5.

<sup>818</sup> See *supra* Table 5.

<sup>819</sup> See *supra* Table 5.

<sup>820</sup> See *supra* Table 5.

<sup>821</sup> See *supra* Table 5.

<sup>822</sup> See *supra* Table 5.

<sup>823</sup> See *supra* Table 5.

<sup>824</sup> See *supra* Table 5.

<sup>825</sup> See *supra* Table 5.

<sup>826</sup> See *supra* Table 5.

<sup>827</sup> See *supra* Table 5.

<sup>828</sup> See *supra* Table 5.

cally significant finding in Model B: class action complainants are substantially more likely to lose on appeal when their theory of recovery sounds in contract.<sup>829</sup> The corresponding statistically noteworthy probit coefficient (-0.3560) for the interaction-effect variable—"ClassAction \*Contract Claims"—is negative.<sup>830</sup>

The final statistically significant variable in Model B is "ClassAction \*Civil-Rights Claims." Its corresponding probit value (0.4205) is positive.<sup>831</sup> It strongly suggests that class action members are considerably more likely to win than lose civil-rights actions in courts of appeals.<sup>832</sup> By comparison, the positive influence of this latter variable for class members does not appear in Model A.<sup>833</sup> Then again, in Model A, the "ClassAction \*Consumers' Claims" variable has a statistically significant and negative influence (-0.4006) on class members' likelihood of success in courts of appeal.<sup>834</sup> On the other hand, the direction of this latter variable's influence under Model B is also negative (-0.2147); its impact, however, is not statistically significant.<sup>835</sup>

Finally, one additional observation is worth noting at this point. In Models A and B, the respective probit values for complainants' ethnicity—Anglo-American and African-American—are not statistically significant.<sup>836</sup> Of course, in law, there is no sound reason why they should be "predictive."<sup>837</sup> But several empirically based legal studies have shown that, wittingly or unwittingly, both state and federal courts of appeals allow complainants' race/ethnicity to influence outcomes in a variety of legal controversies.<sup>838</sup>

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<sup>829</sup> See *supra* Table 5.

<sup>830</sup> See *supra* Table 5.

<sup>831</sup> See *supra* Table 5.

<sup>832</sup> See *supra* Table 5.

<sup>833</sup> See *supra* Table 5.

<sup>834</sup> See *supra* Table 5.

<sup>835</sup> See *supra* Table 5.

<sup>836</sup> See *supra* Table 5.

<sup>837</sup> Willy E. Rice, *Race, Gender, Redlining, and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950–1995*, 33 SAN DIEGO L. REV. 583, 584 (1996).

<sup>838</sup> See generally David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); Charlotte L. Lanvers, *Different Federal District Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia*, 16 CORNELL J.L. & PUB. POL'Y 381 (2007); Rice, *supra* note 837.

Therefore, in light of the positive and negative effects of the variables discussed above, we must ask: what do the statistically significant class action findings suggest? At a minimum, we may conclude that, when examining the unique and concurrent impact of all variables in the two models, complainants are significantly more likely to win when (1) state courts of appeals decide the class action disputes, and (2) when appellate courts hear and resolve civil-rights disputes.<sup>839</sup> Conversely, class action defendants—multinational corporations and insurers—are appreciably more likely to prevail (1) when federal courts of appeals resolve the class action controversies, and (2) when appellate courts hear and resolve class actions involving breach-of-contract action and consumer violation claims.<sup>840</sup>

But should one expect class members to win considerably more class actions in state appellate courts than class defendants? Should defendants prevail significantly more often when federal courts of appeals decide questions of law and fact in class action cases? Furthermore, should one expect the unique effects of class members’ theories of recovery or choices of law to predict class members’ likelihood of winning or losing in either federal or state courts of appeals? Or should one expect any of the variables appearing in Table 5 to influence the disposition of class actions in state and federal courts of appeals? The resounding answer to each question is no.<sup>841</sup>

Yet as we have seen in this empirical study, those variables affect class action litigants’ likelihood of receiving favorable or unfavorable legal and equitable rulings and remedies in state and federal courts of appeals.<sup>842</sup> In view of these unexpected statistical findings, one could reasonably conclude that both federal and state appellate courts are intentionally or unintentionally allowing irrelevant, prejudicial or extra-legal factors significantly influence the disposition of class actions. Perhaps the statistical effects of immaterial variables on litigants’ likelihood of success or failure explain, in part, class action defendants’ and complainants’ respective reticence about litigating class actions in state courts or in federal courts.

#### CONCLUSION

Among objective judges and experienced practicing attorneys, there is general agreement about one point: a class action is a more efficient pro-

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<sup>839</sup> See *supra* Table 5.

<sup>840</sup> See *supra* Table 3.

<sup>841</sup> See *supra* Table 5.

<sup>842</sup> See *supra* Table 5.

cedure to resolve numerous disputes at once, using a single lawsuit rather than multiple, time-consuming, and expensive lawsuits.<sup>843</sup> Moreover, the Supreme Court has found and concluded on numerous occasions that state court judges are remarkably competent to decide general actions involving state and federal claims.<sup>844</sup> Thus, it is reasonable to conclude that state judges also have the requisite proficiency as well as the professional and judicial character to hear and decide state substantive law class actions in a fair manner. Yet, as reported throughout this Article, class action reformers—primarily multinational corporations, national insurance companies, and their congressional supporters—have been quite vocal: reformers have proclaimed incessantly that state court judges and juries are exceedingly ill-prepared to hear and decide state law class actions, especially those which are allegedly disputes of “national importance.”<sup>845</sup> Moreover, class

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<sup>843</sup> See, e.g., *Beverly Enterprises-Arkansas, Inc. v. Thomas*, 259 S.W.3d 445, 451 (Ark. 2007) (“A class action is clearly a more efficient way of handling a case where there is a predominating, common issue to be resolved for all 489 class members.”); *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 455 (Tex. 2007) (“Aggregation of claims in an appropriate class action is a more efficient way to resolve numerous disputes at once.”).

<sup>844</sup> See, e.g., *San Remo Hotel, L.P. v. City and Cnty. of S.F.*, 545 U.S. 323, 347 (2005) (“State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.”); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 449 (2001) (“[We] concluded that both courts erred [by] failing to recognize that the state court was competent to hear the employee’s personal injury claim and the vessel owner’s claim for limitation.”); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975) (“The principle underlying *Younger* and *Samuels* is that state courts are fully competent to adjudicate constitutional claims, and therefore a federal court should, in all but the most exceptional circumstances, refuse to interfere with an ongoing state criminal proceeding.”); *Madruga v. Super. Ct. of Cal.*, 346 U.S. 556, 560–61 (1954) (“[State courts are] ‘competent’ to adjudicate maritime causes of action in proceedings ‘*in personam*,’ [if] the defendant is a person [rather than] a ship or some other instrument of navigation.”) (citation omitted); see also *California v. Grace Brethren Church*, 457 U.S. 399, 411 (1982) (noting that the district court in this case was without jurisdiction unless there was no “plain, speedy and efficient remedy” in state court); *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 528 (1980) (finding the Illinois’ legal remedy was a “plain, speedy and efficient” remedy”).

<sup>845</sup> See, e.g., 151 CONG. REC. 1828 (2005) (statement of Sen. Orrin Hatch) (“This [class action reform bill] is not an overwhelming antilawyer bill.... This is a bill that will straighten out these egregious, wrongful actions by some of these jurisdictions by putting these important cases in courts where it is much more likely that justice will prevail.... It is just that these cases will be tried in federal jurisdictions in these very prestigious federal courts, as they should be because of the diversity problems that are presented by these cases, and it is much more likely that we will have less fraud, less unfairness, less jackpot justice in the federal courts.”); *id.* at 2643 (statement of Rep. Edward Markey) (“[H]ere it



action reformers have argued that forcing corporations and national insurers to defend themselves and litigate “nationwide class actions” in state courts is inefficient and unfair, because each state court judge has to weigh and apply, if necessary, fifty-one different sets of substantive laws to resolve each dispute.<sup>846</sup>

Perhaps class action reformers’ more cutting and contentious charges are these: (1) “crafty,” “abusive,” “unscrupulous,” and “profiteering” class action lawyers shamelessly manipulate or “game” state courts’ civil procedures and file “frivolous class actions”—which allegedly harm consumers, businesses, the economy, and job creation;<sup>847</sup> (2) “dishonest” class

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is, ladies and gentlemen. Citigroup’s Smith Barney subdivision: ‘*Tobacco. Flash—Senate Just Passed Class Action Bill—Positive for Tobacco.*’ Let me read it to you: ‘The Senate just passed [a class action reform] bill, 72–26.... This bill is designated to funnel class action suits with plaintiffs in different States out of State courts and into the federal court system, which is typically much less sympathetic to such litigation. The practical effect of the change could be that many cases will never be heard given how overburdened Federal judges are, which might help limit the number of cases .... [The CAFA] is the final payback to the tobacco industry, to the asbestos industry, to the oil industry, to the chemical industry at the expense of ordinary families who need to be able to go to court to protect their loved ones when their health has been compromised. And these people are saying, your State is not smart enough, your jurors are not smart enough to understand how the MTBE ruined the groundwater in their state and poisoned thousands of people, that it has to go to a State where Amerada Hess or some large oil company feels comfortable.’”).

<sup>846</sup> See *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 721 (5th Cir. 2007) (discussing a corporate defendant “asserting that the district court abused its discretion [by] certifying a nationwide class ... under the laws of fifty-one jurisdictions”); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 454 (E.D. La. 2006) (regarding a corporate defendant’s claim that the application of the laws of fifty-one jurisdictions to the proposed class action claims prevented class members from satisfying the typicality, adequacy, predominance, and superiority requirements of Rule 23).

<sup>847</sup> See 151 CONG. REC. 2071 (statement of Sen. David Vitter) (“[W]e need to pass this [class action reform bill because] there are loopholes in the class action system.... [I]n recent years class actions have been subject to abuses that actually work to the detriment of individual consumers.... Additionally, this gaming of the system clearly works to the detriment of business and our economy and the need for job creation. We currently have a system, therefore, which some trial lawyers...game the system in an effort to maximize their fees.”); *id.* at 1826 (statement of Sen. Orrin Hatch) (“Frequently, class actions are the best way to compensate large groups of injured consumers. Yet, ... the financial reward of a settlement is so great that the class action system has attracted a small group of unscrupulous lawyers who will do anything, say anything, and sue anything or anybody—not to help their clients but to line their own pockets.... A small handful of wealthy lawyers is profiting from the class action system.”); *id.* at 1809 (statement of Sen. John Cornyn) (“We have seen that some of these egregious abuses of the class action procedure have been used to make certain entrepreneurial lawyers very wealthy when the consumers literally get a coupon worth pennies on the dollar .... I like to think

action lawyers' "sympathetic," "friendly," and unprincipled "accomplices"—state court judges—wield enormous judicial powers, creating injustice and "tilting" judicial proceedings in favor of class action lawyers;<sup>848</sup> and (3) "intimidating" state court judges are intentionally biased against out-of-state defendants and consistently violate corporate defendants' fundamental rights of due process.<sup>849</sup> Therefore, according to class action reformers, multinational corporations and insurers are more likely to "lose" class action lawsuits procedurally and on the merits in state courts.<sup>850</sup>

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anybody with common sense recognizes the very real abuses that have occurred in the class action system."); *see also supra* notes 613 and 726 and accompanying text.

<sup>848</sup> *See, e.g.*, 151 CONG. REC. 2636 (statement of Rep. James Sensenbrenner) ("I rise in strong support of ... the Class Action Fairness Act of 2005.... The crisis now threatens the integrity of our civil justice system and undermines the economic vitality upon which job creation depends.... [Among the] infamous handful of magnet courts ... the increase in filings now exceeds 5,000 percent. The only explanation for this phenomenon is aggressive forum shopping by trial lawyers to find courts and judges who will act as willing accomplices in a judicial power grab, hearing nationwide cases and setting policy for the entire country."); *id.* at 2085 (statement of Sen. George Allen) ("We have heard about cases where lawyers shop around to find courts in particular counties that have a proven track record of being sympathetic to class action lawsuits with absurdly large judgments. When justice arbitrarily hinges on [the location of the] county in which a case is tried, that is not fair."); *id.* at 2074 (statement of Sen. Orrin Hatch) ("Over the past several years, we have seen a rise in the number of class action lawsuits filed in a few state courts known for tilting the playing field in favor of the plaintiffs' bar ... dishonestly ... getting the courts to not do justice. These courts, referred to as 'magnet courts' for their attractive qualities to enterprising plaintiffs' lawyers, certify class actions with little regard to defendants' due process rights.").

<sup>849</sup> *See, e.g., id.* at 2645 (statement of Rep. Christopher Cannon) ("[Class action lawyers will] find a person who is the named plaintiff.... Sometimes they have to promise to pay off that named plaintiff at this point, but that is all part of the game.... Rule 23 is the rule that would apply in federal courts that defines when a class action can be certified consistent with fundamental fairness and due process considerations. But in this game, there is no fairness. There is no due process. So [class action lawyers] easily convince their magnet state [court] to certify ... a class."); *id.* at 2081 (statement of Sen. Jeff Sessions) ([T]he American Tort Reform Association [conducted a study, outlining] large number[s] of frivolous class actions [by counties. It also listed] judicial cultures that ignore basic due process and legal protections and ... [the county judges who] intimidate proponents of tort reform."); *id.* at 2071 (statement of Sen. David Vitter) ("[T]rial lawyers seek out jurisdictions in which the judge will not hesitate to approve settlements in which the lawyers walk away with huge fees and the plaintiff class members often get next to nothing. The judges in these jurisdictions will decide the claims of other State citizens under their unique State law. They will use litigation models that deny due process rights to consumers and defendants.").

<sup>850</sup> *See, e.g.*, 151 CONG. REC. 2084 (statement of Sen. Mike Enzi) ("Lawsuits that have plaintiffs and defendants from multiple States are tried in small State courts with

Certainly, the empirical study discussed in this Article cannot and was not designed to determine whether state court judges and jurors are more or less competent to decide class actions than their counterparts who sit on the federal bench. Furthermore, the present study cannot adequately resolve two additional controversies: (1) whether allegedly “intimidating” and “hostile” state court judges conspire with supposedly “abusive” and “unscrupulous” class action lawyers to violate class action defendants’ procedural and substantive due-process rights, and (2) whether state court or federal court judges are more or less likely to allow politics or political considerations to influence their class action rulings.<sup>851</sup> On the other hand, the statistical findings reported here are clear about one matter: multinational insurers and other corporate defendants are exceedingly more likely to win class actions in both state and federal courts.<sup>852</sup>

Moreover, the findings reveal that corporate defendants are more likely to “win” large numbers of class actions regardless of whether federal district courts or state courts of general jurisdiction decide class actions procedurally or on the merits.<sup>853</sup> But even more telling, corporate defendants—rather than class complainants—are significantly more likely to win

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known biases.... [I]n a case involving plaintiffs from Wyoming and Alabama and defendants from New York and Idaho that no party [should have] the inevitable ‘home-court’ advantage that comes when a case is tried in your backyard.... [This bill] is a step in the right direction.... [I]t ensures that cases involving folks from Illinois, Arkansas, and Mississippi are not decided in a State court in Wyoming. These ... interstate cases ... should [be] decided without a home state bias that can exist in some State courts.... [This bill] gives the defendants in a lawsuit a chance to have their day in an impartial court.”).

<sup>851</sup> *Cf. id.* at 2071 (statement of Sen. David Vitter) (“[S]ome trial lawyers seeking to game the system in an effort to maximize their fees seek out some small jurisdiction to pursue nationwide [class action] cases.... Often, these suits have very little, if anything, to do with the place in which they are brought. Rather, lawyers select the venues for strategic reasons, or for political reasons, a practice known as forum shopping.”); *id.* at 1831 (statement of Sen. Jeff Sessions) (“[T]he only class of workers that will be negatively affected by [CAFA] is the trial lawyers who will no longer be able to bring major nationwide class actions in their favorite county court.... It has long been recognized that Federal courts, by virtue of their independence from political pressure, provide a more objective, hospitable forum ... than State courts.”); *id.* at 1827 (statement of Sen. Orrin Hatch) (“Many State courts appear at times to be nothing more than rubberstamps for [lawyers].... This is not civil justice.... The Class Action Fairness Act would alleviate many of the problems present in the current class action system.... [Consumers’ class actions will] have to be brought in a legitimate way, in Federal court where it is much less likely that they will be hammered by political judges who are in cahoots with the plaintiffs’ lawyers in that jurisdiction. Federal courts as a general rule will adequately dispense justice in these matters.”).

<sup>852</sup> See *supra* Table 3.

<sup>853</sup> See *supra* Table 2.

the overwhelming majority of class actions in state as well as in federal courts of appeals.<sup>854</sup> In fact, none of the reported statistically significant findings support class action reformers' general assertion that multinational corporations and national insurers are substantially more likely to lose class actions in state courts, because purportedly "incompetent," "intimidating," and "prejudiced" state court judges have a noticeable propensity to abuse out-of-state defendants' procedural and substantive rights.<sup>855</sup>

But let us assume that the empirical findings reported here are indisputable and they do not support class action reformers' and their congressional supporters' "biased state judges" theory. Still, one might appropriately ask: why should CAFA's questionable class action removal provision generate the slightest concern among fair-minded states' righters and commonsensical jurists—practitioners, judges, and legal scholars? Once more, under CAFA, a defendant may remove an arguably purely state law class action from a state trial or circuit court to a federal district court, if the controversy is a "case of national importance."<sup>856</sup> To prove that a controversy has "national importance," a defendant must establish three elements: (1) the citizenship of a single class member is different from any other litigant's citizenship—"minimal jurisdiction"; (2) the class comprises at least 100 members; and (3) the class members' requested damages exceed \$5 million.<sup>857</sup>

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<sup>854</sup> See *supra* Table 3.

<sup>855</sup> Cf. *Deutsche Bank Nat'l Trust Co. v. Weickert*, 638 F. Supp. 2d 826, 829–30 (N.D. Ohio 2009) ("The 'Findings' section of CAFA [states in relevant part]: '(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are (A) keeping cases of national importance out of Federal court; (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.' CAFA § 2(a)(4), Pub. L. No. 109-2, 119 Stat. 4, 5 (2005). Congress went on to state that one of the purposes of CAFA was to 'restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.' CAFA § 2(b)(2).").

<sup>856</sup> See, e.g., *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005); *Schwartz v. Comcast Corp.*, 2005 WL 1799414, at \*4 (E.D. Pa. July 28, 2005) (concluding that "a removing defendant bears the burden of establishing federal court jurisdiction and that all doubts must be resolved in favor of remand" and that CAFA did not alter this rule).

<sup>857</sup> See *Weickert*, 638 F. Supp. 2d at 829–30 ("Congress intended to expand federal diversity jurisdiction in certain qualifying class actions (those where the claim exceeds \$5 million, the class includes at least 100 plaintiffs, and minimal diversity exists [sic]). The 'Findings' section of CAFA reflected this 'national importance': (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and

To be sure, an intelligible discussion of the “overbroad doctrine” under the Constitution is neither possible nor warranted here.<sup>858</sup> But the procedural test to establish that a class action of national importance is “overbroad,” undermines or attacks at least two key fundamental principles of judicial federalism: (1) like federal judges, state court judges have the competence, temperament, and more importantly, common sense to protect all litigants’ basic civil and economic rights; and, (2) state courts are better suited to hear and decide purely state law causes of action.<sup>859</sup>

The second principle has been seriously undermined or questioned. To illustrate, consider these facts. Among other claims, consumers often allege that corporate defendants violate states’ anti-pollution, fair debt collection, consumer protection, deceptive trade practices, employment dis-

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the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are (A) keeping cases of national importance out of Federal court; (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States. CAFA § 2(a)(4), Pub. L. No. 109-2, 119 Stat. 4, 5 (2005).”); *see also* *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 n.7 (1967) (reiterating that Article III of the Constitution grants diversity jurisdiction and permits federal courts to decide cases with only “minimal diversity”—proof that just one party or litigant has citizenship which is different from all other parties).

<sup>858</sup> *See generally In re FedPak Sys., Inc.*, 80 F.3d 207, 214 (7th Cir. 1996) (questioning federal bankruptcy courts’ jurisdiction and favoring a narrow “related to” standard “to prevent the expansion of federal jurisdiction over disputes that are best resolved by the state courts”); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 787–88 (11th Cir. 1990) (questioning federal bankruptcy courts’ jurisdiction and stating that an “overbroad construction” of “related to” jurisdiction may bring into federal court matters that should be decided by state courts).

<sup>859</sup> *Cf. Note, Bankruptcy and the Limits of Federal Jurisdiction*, 95 HARV. L. REV. 703, 709–11 (1982) (“The broadest construction of federal question jurisdiction views congressional action under article I as a source of judicial power.... Congress, by virtue of its article I power to create a bankruptcy trustee, can confer on the federal courts jurisdiction over all controversies to which the trustee is a party.... The article III approach does not limit the federal courts to cases in which the governing law is federal; it has long been held that some state law claims (even outside such areas as diversity jurisdiction) are properly the subject of federal jurisdiction. But the article III approach does require the court to identify a ‘federal interest’ at stake in the litigation of a state law claim. The range of permissible federal interests thus determines the breadth of federal jurisdiction. A broad construction of federal interests would grant ‘protective jurisdiction’ when Congress has enacted legislation ‘expressing a national policy in the area concerned’ .... But the broad article III approach is flawed by an underlying assumption that state courts are ill-suited to participate in a national program. That assumption is out of step with the Supreme Court’s growing reliance on the state courts to protect basic civil and economic rights. When state courts are viewed as the partners of federal courts, ‘protective jurisdiction’ becomes an overbroad justification for federal jurisdiction over state law claims, the resolution of which is not necessary to promote federal objectives.” (footnotes omitted)).



crimination, and products liability statutes.<sup>860</sup> Still other class members file breach-of-contract claims against sellers and vendors who sell defective goods and services within a state.<sup>861</sup> However, in the wake of CAFA,

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<sup>860</sup> See, e.g., *Health Group Sues McDonald's over Happy Meal Toys*, SAN JOSE MERCURY, Dec. 15, 2010 ("A California mother [is] ... suing McDonald's Corp. to get the fast-food chain to stop using toys to market meals to young children.... They say McDonald's is violating several consumer protection laws .... [L]awyers ... filed the lawsuit in state court in San Francisco ... [and] have asked that it be certified as a class action."); *Minnesota Prepares to Sue a Debt Collection Agency*, N.Y. TIMES, Mar. 29, 2011, at B9, ("Minnesota's attorney general accused the Encore Capital Group of cutting corners by filing 'robo-signed' affidavits in debt collection lawsuits, the same practice for which banks have come under fire in home foreclosures.... The Minnesota attorney general, Lori Swanson, accused Encore of fraud .... Ms. Swanson wants the Ohio court to clarify that the proposed class-action settlement does not bar government agencies from pursuing similar litigation. She is seeking to file her lawsuit in a Minnesota state court."); P. J. Huffstutter, *Suits Against Supermarkets Advance: A Judge Certifies Two Class Actions Brought by Employees of Ralphs and Albertsons*, L.A. TIMES, Oct. 23, 2010, at B3 ("A federal judge has certified two separate class-action lawsuits against grocery chains Ralphs and Albertsons -- advancing a legal fight between the retailers and 9,000 workers who contend they were illegally denied millions of dollars in [unemployment] benefits during the 2003-04 grocery lockout and strike."); Dana Littlefield, *Two Car Owners in County Sue Toyota in State Court; Lawyers Are Seeking Class-Action Status*, SAN DIEGO UNION-TRIB., Mar. 27, 2010, at B1 ("A lawsuit was filed ... in state court on behalf of two San Diego County car owners who claim they've experienced the same problems and defects with their vehicles that led to a recent recall.... [L]awyers said the [class action] lawsuit was filed in Superior Court because Toyota has offices in California, an option that was unavailable to out-of-state plaintiffs. The attorneys said unfair-competition laws here would be more beneficial to their clients than federal law."); Mireya Navarro, *Better Cleanup Is Planned at a Former Chrome Plant*, N.Y. TIMES, Apr. 6, 2011, at A19 ("New Jersey officials have identified more than 160 sites ... contaminated by chromium. Most of it came from the production of coatings for machine parts and from chromium-laced waste used as fill material in construction in the 1950s and the 1960s.... [A] class-action lawsuit [was] filed ... in state court against both Honeywell and PPG seeking compensation for landowners whose properties have been devalued and payments for regular medical screenings."); Karen Robinson-Jacobs, *Suits Accuse Snapple of False Health Claims*, DALL. MORNING NEWS, Nov. 20, 2010, at D1 ("The Plano-based maker of Snapple faces lawsuits in California and Florida that accuse the company of false and misleading' claims about the health benefits of its Acai Mixed Berry Red Tea.... [T]he California lawsuit ... was filed ... in federal court and seeks class-action status .... The Florida case [was] filed in state court [and] ... makes a similar claim.").

<sup>861</sup> See, e.g., Keith Herbert, *Customers Seek Class-Action Status*, NEWSDAY (New York), Oct. 28, 2010, at A18 ("Cablevision subscribers, upset over not having Fox television programs during the network's fee dispute with the cable television provider, have begun filing class-action lawsuits that seek refunds. Five Cablevision subscribers were named as complainants in two separate lawsuits, one filed in state court in Nassau County ... [They asked] that a judge approve class-action status, which allows the courts to deal with a large number of small claims collectively.").



disgruntled consumers have filed thousands of such class actions in state courts, which have been removed to federal district courts.<sup>862</sup> Moreover, even if one uses a conservative and rough estimate, an examination of pre- and post-CAFA reported cases suggests that nearly ninety percent of the class actions filed in state courts could qualify as “disputes of national importance.”<sup>863</sup>

Thus, in view of the empirical findings reported in this Article, Congress fashioned and enacted an extremely “overbroad” class action removal provision, and Congress achieved that end by embracing class action reformers’ uninformed arguments which have no sound foundation in fact or in law.<sup>864</sup> As of this writing, there are 94 federal district courts,<sup>865</sup> and approximately 2,177 state trial courts of general jurisdiction.<sup>866</sup> Even more significantly, there are about 10,387 trial judges who try cases in state

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<sup>862</sup> See Christopher Chorba et al., *Year-End Update on Class Actions: Explosive Growth in Class Actions Continues Despite Mounting Obstacles to Certification*, GIBSON DUNN (Feb. 10, 2009) <http://www.gibsondunn.com/Publications/Pages/Year-EndUpdateOnClassActions.aspx> (“The number of class actions has grown exponentially in recent years. Although reliable numbers are hard to come by, Federal Judicial Center statistics suggest that new class action cases filed in or removed to federal court increased 72% between 2001 and 2007, reaching approximately 4,000 to 5,000 annually as of mid-2007 (the last period for which data are available). This represents more than a dozen new lawsuits every day. And while the Class Action Fairness Act (‘CAFA’) has shifted many putative nationwide class actions from the state to the federal system, ... class action lawyers ... report that state court class action activity in many courts has not diminished. CAFA has prompted a flurry of single-state class actions filed in state courts, and recent statistics show that in at least one forum favored by the plaintiffs’ bar (Los Angeles), state class action filings continue to grow.” (footnotes omitted)).

<sup>863</sup> The author searched Westlaw’s ALLSTATES database and submitted the following query on June 21, 2011: *sy(“class action” /p damages) & da(aft December 21, 1989)*. That submission generated 535 cases. Later, the author executed the Westlaw’s “locate command,” looking for the following words or phrases in each case: “*class size*,” “*million*,” “*size*,” “*damages*,” and “*large*.” The statement appearing in the text is based on a twenty-five percent sampling of the reported, state law cases.

<sup>864</sup> See 151 CONG. REC. 2651–52 (2005) (statement of Rep. Mark Udall).

<sup>865</sup> See BNA’S DIRECTORY OF STATE AND FEDERAL COURTS, JUDGES, AND CLERKS 1 (2011).

<sup>866</sup> See generally *id.* at xvii. State trial courts of general jurisdiction appear under various headings—circuit courts, commonwealth courts, courts of common pleas, district courts, superior courts, and supreme court in New York. *Id.* For each state, the author reviewed and added the statistics appearing under the heading “Court Structure as of Fiscal Year 2007.” *Id.* “The *Directory* contains listings for courts of record, which are the top three courts levels; the limited-jurisdiction trial courts are not included. The court structure charts are included in order to provide a view of the entire court structure of a state.” *Id.* Thus, total number appearing in the text is a fair approximation. *Id.*

courts.<sup>867</sup> Consequently, the implicit message that CAFA's removal provision communicates is resoundingly clear: year in and year out, ninety-four federal district courts' judges—rather than ten thousand-plus state trial-court judges—are decidedly more efficient, more impartial, and intellectually more talented to adjudicate thousands of purely state law class actions in a timely manner.<sup>868</sup>

In addition, contrary to what some class action reformers have proclaimed, the prevailing view is that the ninety-four federal district courts are already overburdened.<sup>869</sup> And, although reasonable minds may differ, there is general agreement about another matter: CAFA's "class actions of national importance" removal test is an easy-to-satisfy standard and it is likely to exacerbate federal district courts' overload problems by producing a massive backlog of cases.<sup>870</sup> Thus, the author embraces the current

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<sup>867</sup> BNA'S DIRECTORY, *supra* 865, at xvii.

<sup>868</sup> 151 CONG. REC. 1828 (statement of Sen. Orrin Hatch).

<sup>869</sup> *See, e.g., id.* at 2074 (statement of Sen. Orrin Hatch) ("I have heard some opponents ... argue that the Class Action Fairness Act will somehow result in a delay or even a denial of justice to consumers. They have argued that state courts resolve claims more quickly, and that removing these actions will result in the overburdening of our federal courts. I have yet to see or hear a single shred of persuasive evidence to support these claims. In fact, according to the data, a strong case in the opposite direction can be made. According to two separate examinations of the state and federal court systems conducted by the Court Statistics Project and Administrative Office of the U.S. Courts, the average state court judge is assigned nearly three times—nearly three times—as many cases as a federal court judge. The increase of State court class actions further compounds this burden and interferes with the ability of the state court judges to provide justice to their citizens."). *But see id.* at 2079 (statement of Sen. Tom Carper) ("Finally ... [when] shifting some class action litigation of a national scope [to federal district courts] ... [we need to be sure that] we do not overburden the already busy Federal judiciary.").

<sup>870</sup> *Cf. id.* at 2653 (statement of Rep. Joe Baca) ("[CAFA] will send the majority of class action suits from State to Federal courts, making it more difficult for people who have been unfairly hurt to collect compensation for their injuries."); *id.* at 2651–52 (statement of Rep. Mark Udall) ("Mr. Speaker, one of the most important rights we have as Americans is the ability to seek redress from the courts when we believe our rights have been abridged or we have been improperly treated. And, when a complaint arises under a State law, it is both appropriate and desirable that it be heard in State court because those are the most convenient and with the best understanding of State laws and local conditions. Of course, it is appropriate to provide for removing some State cases to Federal courts. But I think that should be more the exception than the rule, and I think this bill tends to reverse that. I think it excessively tilts the balance between the States and the Federal government so as to throw too many cases into already-overburdened Federal courts—with the predictable result that too many will be dismissed."); *id.* at 1657 (statement of Sen. Russell Feingold) ("A particularly troubling result of this bill will be an increase in the workload of the Federal courts. We all know these courts are already overloaded.... The Congress has led the way in bringing more and more litigation to the

conventional wisdom that allowing corporate defendants to remove thousands of purely state law class actions to already-overburdened federal district courts will decrease those tribunals’ likelihood of hearing and deciding so-called “class actions of national importance” judicially, meticulously, efficiently, impartially, and in a timely manner.<sup>871</sup>

Before closing, one additional point needs emphasis. Even assuming that state and federal courts will be able to secure adequate resources to hear and decide efficiently and timely all types of class actions, one problem still remains. As reported earlier, the types of state law and federal theories of recoveries appearing in class members’ pleadings influence states’ as well as federal courts’ disposition of class actions.<sup>872</sup> In particular, class action litigants’ likelihood of prevailing or losing is based on (1) whether consumer protection claims or securities violation claims form the basis of complainants’ class actions, and (2) whether breach-of-contract claims or tort-based allegations formed the basis of class members’ complaints.<sup>873</sup>

The present study, however, also uncovered some debatably unsettling findings. Again, class members and defendants are substantially more likely to “win” or “lose” when state and federal judges intentionally or unintentionally allow arguably impermissible or extralegal variables to influence the disposition of class actions.<sup>874</sup> For example, class members and defendants are likely to “win” or “lose” class actions procedurally or on the merits depending on: (1) whether complainants filed class actions in courts located in the western region or in the southern region of the country, (2) whether racial minorities filed class actions in federal district courts or in state trial courts, (3) whether the Fifth Circuit or the Fourth Circuit resolved substantive and procedural class action issues on appeal, and (4) whether the Seventh Circuit or the Eleventh Circuit resolved class action questions of law and fact on appeal.<sup>875</sup>

Certainly, after a painstaking review of the common law as well as state and federal statutes, one would be hard-pressed to find any statement

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Federal courts ....”); *id.* at 1649 (Letter to the Majority and Minority Leaders from Fifteen State Attorneys General) (“[B]y transferring most state court class actions to an already overburdened federal court system, this [Act] will delay (if not deny) justice [for] a substantial number of injured citizens.”).

<sup>871</sup> See 151 CONG. REC. 2653 (statement of Rep. Joe Baca); *id.* at 2651–52 (statement of Rep. Mark Udall); *id.* at 1657 (statement of Sen. Russell Feingold); *id.* at 1649 (Letter to the Majority and Minority Leaders from Fifteen State Attorneys General).

<sup>872</sup> See *supra* Table 3.

<sup>873</sup> See *supra* Table 5.

<sup>874</sup> See, e.g., *supra* Table 3 and Table 5.

<sup>875</sup> See *supra* Table 1 and Table 3.

suggesting that a particular theory of recovery is more or less likely to influence or predict the disposition of class actions. The absence of such a finding is neither good nor bad, neither expected nor unexpected. Of course, one's discovering that certain theories of recovery have fairly strong "predictive power" might be enlightening or even useful for some lawyers who commence class actions, or defend corporate clients against class actions in state and federal courts. Contrarily, upon carefully examining state and federal laws, one also would have to search extensively and diligently to find any intelligible reasons to explain federal and state judges' propensity to allow any extralegal factors—ethnicity, politics, occupation, years of education, gender or geography—to influence the disposition of class actions. Simply put, federal and state laws do not predict such outcomes and such statistically significant findings should not appear among otherwise competent and impartial federal and state judges' class action declarations, motions, judgments, or jury charges. Yet, in the present study, such influences are clearly evident.<sup>876</sup>

Again, the doctrines of comity, finality, and federalism evolved for important reasons.<sup>877</sup> In part, they are designed to ensure "harmonious state-federal relations"<sup>878</sup> and to create efficient federal and state judiciaries—which will conserve precious judicial resources, decide cases in a timely manner and award appropriate remedies.<sup>879</sup> Second, "federal courts

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<sup>876</sup> See, e.g., *supra* Table 3, *infra* Table A.

<sup>877</sup> See, e.g., *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) (concluding that the statute's purpose "further[s] comity, finality, and federalism" (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)); *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (reiterating that the purpose of the federal statute is "to further the principles of comity, finality, and federalism" (quoting *Williams*, 529 U.S. at 436)); *Williams*, 529 U.S. at 436 (recognizing that the purpose of the federal statutes is "to further the principles of comity, finality, and federalism."); *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586 (1995) ("We have long recognized that principles of federalism and comity generally counsel that [federal] courts should adopt a hands-off approach with respect to state tax administration.").

<sup>878</sup> See *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1948) (Frankfurter) ("[A] close observation of the limitation upon the Court is not ... a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious State-federal relations.").

<sup>879</sup> See *Panetti v. Quarterman*, No. 06-6407, slip op. 1, 12 (U.S. June 28, 2007); see also *Day v. McDonough*, 547 U.S. 198, 205–06 (2006) ("The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." (quoting *Acosta v. Artuz*, 221 F.3d 117, 122 (2d Cir. 2000))); *Pennsylvania v. Ritchie*, 480 U.S. 39, 49 n.7 (1987) ("The goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures. Based on the unusual

are courts of limited jurisdiction.”<sup>880</sup> Their power to hear and decide federal or state law controversies is constrained.<sup>881</sup> Furthermore, more than a century and a half ago, the Supreme Court stressed that the “efficient administration of judicial power” is paramount<sup>882</sup> when division-of-labor decisions are made about allocating cases for hearings in federal and state courts, or when one fashions a system to manage federal or state courts’ finances and bureaucracies.<sup>883</sup>

Thus, in light of these fundamental principles and acknowledging that state court judges have the expertise and temperament to fashion “plain, speedy and efficient” remedies, the Supreme Court has repeatedly upheld state judges’ authority to hear and decide various actions involving both

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facts of this case, the justifications for the finality doctrine—efficiency, judicial restraint, and federalism—would be ill served by another round of litigation on an issue that has been authoritatively decided by the highest state court.” (citing *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)); *Radio Station WOW*, 326 U.S. at 123–24 (“Since its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance.... This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction”).

<sup>880</sup> See *Enochs v. Lampasas Cnty.*, 641 F.3d 155, 160 (5th Cir. 2011) (“[I]t was certainly fair to have had the purely Texas state law claims heard in Texas state court, and there is nothing to indicate that either party would have been prejudiced by a remand to Texas state court.... [C]omity demands that the ‘important interests of federalism and comity’ be respected by federal courts, which are courts of limited jurisdiction and ‘not as well equipped for determinations of state law as are state courts.’” (quoting *Parker & Parsley Petrol. Co. v. Dresser Indus.*, 972 F.2d 580, 588 (5th Cir. 1992))); *Durant, Nichols, Houston, Hodgson & Cortese-Costa, P.C. v. Dupont*, 565 F.3d 56, 62 (2d Cir. 2009) (“It is a fundamental precept that federal courts are courts of limited jurisdiction and lack the power to disregard such limits as have been imposed by the Constitution or Congress.”).

<sup>881</sup> See *Enochs*, 641 F.3d at 160; *Durant*, 565 F.3d at 62.

<sup>882</sup> See *Taylor v. Carryl*, 61 U.S. 583, 594 (1857) (noting “that the question presented ... is not a new question [or] determinable upon any novel principle” and stressing that the application of a “just and equal” principle resolved without undermining the “efficient administration of the judicial power”).

<sup>883</sup> Cf. *Mistretta v. United States*, 488 U.S. 361, 389 n.15 (1989) (“[T]he Administrative Office of the United States Courts handles the administrative and personnel matters of the courts, matters essential to the effective and efficient operation of the judicial system [and that] Congress also has established the Federal Judicial Center which studies improvements in judicial administration.” (citing 28 U.S.C. § 604 (1982 ed. & Supp. IV1982))).

state and federal law disputes.<sup>884</sup> Class actions are included among the list.<sup>885</sup> However, CAFA's "cases of national importance" removal clause is arguably an overbroad and unfair procedural tool that undermines states' rights as well as consumers' right to obtain timely and fair hearings in state courts.<sup>886</sup> Quite simply, class action defendants must satisfy only

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<sup>884</sup> See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1039–40 (1983) (stressing that the Court's examining "generally unfamiliar" state laws as well as a vacation and a continuance for clarification were unsatisfactory because the process would create "delay and decrease in [the] efficiency of judicial administration" (quoting *Dixon v. Duffy*, 344 U.S. 143 (1952))); *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) (concluding that "a state-court remedy is 'plain, speedy and efficient'" if it gives the litigant "a 'full hearing and judicial determination,'" which allows the litigant to "raise any and all constitutional objections" (citing *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 514 (1981))); *Rosewell*, 450 U.S. at 528 ("Illinois' legal remedy that provides property owners paying property taxes under protest a refund without interest in two years is a 'plain, speedy and efficient remedy' under the Tax Injunction Act."); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978) (observing that the plaintiff voluntarily chose to commence a suit in federal court that involves a state law claim and stressing that "[a] plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claim ... since it is he who has chosen the federal rather than the state forum," and concluding that "the efficiency that plaintiff [wanted] so avidly [was] available without question in the state courts" (quoting *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F.2d 890, 894 (4th Cir. 1972))). But see *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 390 (1985) (Burger, C.J., concurring) ("If state law is simply indeterminate, the concerns of comity and federalism ... do not come into play. At the same time, the federal courts have direct interests in ensuring that their resources are used efficiently ... as well as in ensuring that parties asserting federal rights have an adequate opportunity to litigate those rights. Given the insubstantiality of the state interests and the weight of the federal interests, a strong argument could be made that a federal rule would be more appropriate than a creative interpretation of ambiguous state law." (footnote omitted)).

<sup>885</sup> 151 CONG. REC. 2652–53 (2005) (statement of Rep. Bill Delahunt).

<sup>886</sup> See Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1245 (2008) ("Defendants need not do much to remove a case from state to federal court. Removal is one of the very few procedural tools that a party ... [may] use: the defendant files a notice of removal, not a motion to remove.... [T]he notice must contain 'a short and plain statement of the grounds for removal.'" (footnote omitted)); see also 151 CONG. REC. 2652–53 (statement of Rep. Bill Delahunt) ("Mr. Speaker, we have before us a bill that would sweep aside generations of State laws that protect consumers. Citizens will be denied their basic right to use their own State courts to file class action lawsuits against companies—even if there are clear violations of State [laws].... [This bill is] the latest in a series of assaults on States' rights to provide legal remedies for harm suffered by their citizens."); *id.* at 2646 (statement of Rep. Melvin Watt) ("This bill ... will effectively undermine the utility, practicality, and choice the class action mechanism has offered to injured persons with legitimate claims against powerful entities.... [And suddenly, why do] my States rights friends believe that the Federal courts and the Federal Government can solve every problem in our society? That is just simply absurd, incon-



three exceedingly easy-to-prove “numerical elements” to establish a class action of national importance.<sup>887</sup> As a consequence, they may remove an inordinate number of truly substantive state law actions to federal courts.<sup>888</sup>

But even more importantly, allowing corporate defendants and others to remove such large numbers of state law class actions to federal courts is statistically and economically irrational.<sup>889</sup> Why? Again, the current empirical findings disclose that class actions reformers’ submitted reasons for wanting to enact the removal statute never existed.<sup>890</sup> “Long-overdue” class action reforms were not warranted, because allegedly “incompetent,” “biased,” and “intimidating” state court judges do not have a long history of deciding class action controversies overwhelmingly against defendants.<sup>891</sup> In fact, the opposite is true.<sup>892</sup> To repeat, class action plaintiffs are substantially more likely to lose procedurally and on the merits in state trial and appellate courts, as well as in federal district and appellate courts.<sup>893</sup> Furthermore, multinational corporations and national insurers have a long history of filing “truly substantive national class actions”

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sistent with any kind of consistent philosophy about federalism.”); *id.* at 2090 (statement of Sen. Patrick Leahy) (“[This reform will] make it harder for American citizens to protect themselves against violation of State civil rights, consumer, health, environmental protection laws, to take these cases to State court.... These courthouses have experience with the legal and factual issues within their States.... Cynics might even speculate that...the business groups [who are] behind this purported ‘procedural’ change are really seeking the dismissal of meritorious cases on procedural grounds by the federal courts.... Anyone who reads this bill will notice that ... it affects more than just class actions. Individual actions, consolidated by state courts for efficiency purposes, are not class actions.... Federalizing these individual cases will no doubt delay, and possibly deny, justice for victims suffering real injuries.”).

<sup>887</sup> *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1202–03 (11th Cir. 2007).

<sup>888</sup> 151 CONG. REC. 2090 (statement of Sen. Patrick Leahy).

<sup>889</sup> *Id.* at 2646 (statement of Rep. Melvin Watt).

<sup>890</sup> See *supra* Table 4.

<sup>891</sup> See 151 CONG. REC. 2095 (statement of Sen. Christopher Dodd) (“[T]o my colleagues who are strong opponents of all of this ... [CAFA] is a simple matter of court reform.... It is long overdue.”); *id.* at 2076 (statement of Sen. Lindsey Graham) (“I agreed to support [CAFA] some time ago because I believe we are long overdue for reform in the class action area.”); *id.* at 2072 (statement of Sen. David Vitter) (“[CAFA] is long overdue.... Time and again, it has been said by parties on all sides that class actions have a proper place in the legal system. This bill is a modest effort to swing the pendulum back toward common sense, making the system work as it was intended.”).

<sup>892</sup> See *supra* Table 2.

<sup>893</sup> See *supra* Table 2.

against other corporations in state courts—where judges are supposedly highly “prejudiced,” “inept,” and “dishonest.”<sup>894</sup>

Finally, in the course of researching this Article, the author uncovered an unexpected finding: CAFA’s jurisdictional and removal provisions have begun to generate serious intra-circuit and inter-circuit conflicts among federal courts over the interpretation of “jurisdictional amount” and over the extent of federal courts’ authority to remove and remand purely substantive state law class actions.<sup>895</sup> Read more broadly, these

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<sup>894</sup> See, e.g., *Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337, 340 (Okla. 1998) (“Black Hawk Oil Company, brought a class action ... for itself and others similarly situated against Exxon Corporation, Oryx Energy Company, and many others as defendants. [Black Hawk sought] damages in both contract and tort for defendants’ failure to pay for the slop oil the Plant operators collected.”); *Canal Ins. Co. v. Gibraltar Budget Plan, Inc.*, 41 So. 3d 375, 376 (Fla. Dist. Ct. App. 2010) (reporting a case in which three premium finance companies filed a class action suit against Canal Insurance Company and Canal Indemnity Company, asking for a declaration of rights and presenting a breach-of-contract claim.); *Tunica Pharmacy, Inc. v. Cumberland Mut. Fire Ins. Co.*, 2010 WL 4116964, at \*1 (N.J. Super. Ct. App. Div. 2010) (“Business Pro Communications, Inc., an Illinois corporation, filed a class action complaint against Express Products in the Nineteenth Judicial Circuit, Lake County, Illinois.... [claiming] that Express Products ... violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C.A. § 227, and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/2, and had committed common-law conversion of fax paper, toner, fax memory, and valuable time by sending unsolicited fax advertisements to businesses nationwide.”); *Myron Corp. v. Atl. Mut. Ins. Corp.*, 970 A.2d 1083, 1085 (N.J. Super. Ct. App. Div. 2009) (“Stonecrafters, Inc., an Illinois corporation, filed a class action complaint against Myron in Illinois state court,” alleging that Myron violated the Illinois Consumer Fraud and Deceptive Business Practices Act and committed common-law conversion.); *Holiday Matinee, Inc. v. Rambus, Inc.*, 13 Cal. Rptr. 3d 766, 767 (Cal. Ct. App. 2004) (considering a case in which a marketing company commenced a class action against computer memory chip company, alleging that the latter violated the Cartwright Act and unfair competition law by engaging in allegedly anticompetitive conduct in connection with patents and licensing.); *Paragon Networks, Int’l v. Macola, Inc.*, 1999 WL 280385, \*1 (Ohio Ct. App. 1999) (“Paragon, a Delaware corporation, filed a class action complaint in the Court of Common Pleas of Marion County against Macola, an Ohio corporation that develops and supplies computer software,” alleging that Macola breached an express warranty and induced Paragon and other members of the class to purchase software based on Macola’s false and misleading representations.).

<sup>895</sup> Compare *Yocham v. Novartis Pharm. Corp.*, 2007 WL 2318493, at \*3 (D.N.J. Aug. 13, 2007) (failing to find with a legal certainty that the amount in controversy had been met), *Dent v. Cingular Wireless, LLC*, 2007 WL 1797653, at \*7 (D.N.J. June 20, 2007) (concluding that a defendant must show with legal certainty that the amount in controversy exceeds the jurisdictional threshold), and *Lamond v. Pepsico, Inc.*, 2007 WL 1695401, at \*3–5 (D.N.J. June 8, 2007) (noting the “confusion” surrounding the nature of defendant’s burden, and concluding that the defendants must prove with legal certainty that the requisite amount-in-controversy element has been satisfied), with *Lowery v. Ala.*

conflicts arguably call into question (1) whether CAFA’s removal provision undermines “harmonious state-federal relations,” respect for state court judges’ competence in particular and judicial federalism generally,<sup>896</sup> (2) whether CAFA’s removal provision is too broad,<sup>897</sup> and (3) whet-

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Power Co., 483 F.3d 1184, 1208 (11th Cir. 2007) (concluding that the removing party bears the burden of establishing the jurisdictional amount has been met by a preponderance of the evidence), *Lowdermilk v. U.S. Bank Nat’l Assoc.*, 479 F.3d 994, 998 (9th Cir. 2007) (stressing that a defendant “seeking removal must prove by a preponderance of the evidence that the amount in controversy requirement has been met.” (quoting *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 683 (9th Cir. 2006))), and *Home Depot, Inc. v. Rickher*, 2006 WL 1727749, at \*1 (7th Cir. May 22, 2006) (concluding that the removing litigant must establish with reasonable probability that the amount-in-controversy requirement has been satisfied (quoting *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005))); see also *In re Fannie Mae 2008 Sec. Litig.*, 2009 WL 4067266, at \*1 (S.D.N.Y. 2009) (“Defendants removed the [class action] from New Jersey state court to the [federal district court] ... based on 15 U.S.C. § 77v(a) and 77p(c), and alternatively [on] 28 U.S.C. § 1332, as amended by the Class Action Fairness Act .... [The class representative] argues that [we] should remand the [class action] because [this] Court lacks subject matter jurisdiction over it. According to [the representative], the 1933 [Securities] Act prohibits the removal of 1933 Act claims from state court to federal court and [the Securities Litigation Uniform Standards Act of 1998’s (SLUSA) amendments] ... do not change the anti-removal provisions.... SLUSA targets state class actions alleging false and misleading statements under state law, and those actions are removable. On the other hand, state class actions alleging only 1933 Act violations are still within the warm embrace of the antiremoval provisions of the 1933 Act. Nothing in the Class Action Fairness Act of 2005 alters this result.... There is conflicting authority on whether SLUSA eliminates state court jurisdiction over state class actions asserting 1933 Act claims.”); *Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 422 (S.D.N.Y. 2009) (“District courts are divided [over] whether the anti-removal provision, as amended by SLUSA, allows for removal of covered class actions raising only 1933 [Securities] Act claims.”).

<sup>896</sup> Cf. *Breakman v. AOL LLC*, 545 F. Supp. 2d 96, 100 (D.D.C. 2008) (“[Since] significant federalism concerns [are] involved, this court strictly construes the scope of its removal jurisdiction.” (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107–09 (1941))); *Strawn v. AT&T Mobility, Inc.*, 513 F. Supp. 2d 599, 604 (S.D. W. Va. 2007) (noting that “removal statutes must be construed in light of the federalism concerns that animate the policy of strictly confining federal jurisdiction within the congressionally-set limits” (citing *Sheets*, 313 U.S. at 108–09)); *Lowery v. Honeywell Int’l, Inc.*, 460 F. Supp. 2d 1288, 1295 (N.D. Ala. 2006) (“While CAFA admittedly broadens federal removal jurisdiction, it does not unanchor the federal courts from the basic principle of federalism that requires the construction of removal statutes against a removing defendant.”).

<sup>897</sup> Cf. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (concluding that “[f]ederal courts are courts of limited jurisdiction” and possess jurisdiction to hear a particular case only if a statute or the Constitution authorizes a hearing); *Eufaula Drugs, Inc. v. Tmesys, Inc.*, 432 F. Supp. 2d 1240, 1245 (M.D. Ala. 2006) (reaffirming that “[f]ederal courts are courts of limited jurisdiction” and that “removal statutes are

her federal courts are precluded from exercising jurisdiction over certain state law class actions because the phrase “national importance” is too ambiguous.<sup>898</sup> Perhaps, if and when one of these inter-circuit removal-and-jurisdictional conflicts reaches the Supreme Court in the not too distant future, that esteemed body will conclude what the research and empirical findings in this Article strongly suggest: (1) CAFA’s highly questionable removal and jurisdictional rules evolved from untruths or just plain fabrications, and (2) the new rules undermine principles of judicial federalism. Therefore, the Supreme Court or, preferably, a new and more enlightened Congress, needs to restore some balance.

#### APPENDIX

##### *A Comparison of Non-Class Action and Class Action Litigants in State and Federal Courts, 1925–2011 (N = 2,657)*

The entire database (N=2,657) for this study comprised both class action and non-class action cases. Necessarily, to test whether courts permit extralegal factors to determine outcomes in class action cases and to test for “selectivity bias” in the sample of cases, the author had to consider courts’ dispositions of non-class action cases, too. Thus, it is important to consider some of the statistics in Table A—which illustrates a number of demographic attributes for litigants who were parties in non-class action (ordinary) and class action lawsuits. Here, only the most relevant percentages are highlighted:

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construed narrowly” (citing *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994))).

<sup>898</sup> Cf. *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2003) (“[I]f federal jurisdiction is doubtful, a remand to state court is necessary.” (quoting *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994))); *In re Bus. Men’s Assurance Co. of Am.*, 992 F.2d 181, 183 (8th Cir. 1993); *Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085, 1087–88 (D.N.D. 2006) (“Following removal of a case to federal court, a plaintiff can seek remand of the action back to state court. Removal statutes are strictly construed in favor of state court jurisdiction and federal district courts must resolve all doubts concerning removal in favor of remand.” (citing 28 U.S.C. § 1447(c))); *Johnson-Brown v. 2200 M Street LLC*, 257 F. Supp. 2d 175, 177 (D.D.C. 2003) (stressing that federal courts “must resolve any ambiguities concerning the propriety of removal in favor of remand” (citing *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999))).

TABLE A  
 DEMOGRAPHIC CHARACTERISTICS OF NON-CLASS ACTION AND CLASS  
 ACTION LAWSUITS IN STATE AND FEDERAL COURTS, 1925–2011  
 (N = 2657)

Demographics	Non-Class Action Suits (N = 1833)		Class Action Suits (N = 824)	
	Frequency	Percent	Frequency	Percent
<b>Jurisdiction:</b>				
Federal Cases	957	52.2	417	50.6
State Cases	876	47.8	407	49.4
<b>Tribunals:</b>				
Trial & District Courts	397	21.7	303	36.7***
Appellate Courts	913	49.9	378	45.9
Supreme Courts	520	28.4***	143	17.4
<b>Region of Country:</b>				
East	451	24.6	228	27.7
Midwest	525	28.6	203	24.6
South	285	15.5	182	22.1***
Southwest	198	11.0	109	13.2
West	365	20.0***	102	12.4
<b>Litigant's Ethnicity:</b>				
Diverse Groups	672	36.6	716	86.9
Anglo-American, only	987	53.9	23	2.8
African-American, only	99	5.4	47	5.7
Mexican-American, only	14	0.8	5	0.6
Other Minorities	61	3.3	33	4.0
<b>Primary Defendants:</b>				
Insurers	1725	94.1	402	48.7
Corporations	108	5.9	200	24.3
Public Entities & Others	—	—	222	27.0
<b>Plaintiffs' "Favorable"</b>				
<b>Outcomes by Courts:</b>				
All Trial/District Courts	773	42.2	349	42.4
All Appellate Courts	554	47.3	221	42.6
All Supreme Courts	285	54.0**	62	43.7**
<b>Defendants' "Favorable"</b>				
<b>Outcomes by Courts:</b>				
All Trial/District Courts	1060	57.8	475	57.6
All Appellate Courts	618	52.7	298	57.4
All Supreme Courts	243	46.0**	80	56.3**

\*\*\* Chi square test statistically significant at  $p \leq 0.0001$

\*\* Chi square test statistically significant at  $p \leq 0.02$

First, a review of the “Jurisdiction” variable and corresponding percentages indicates that the proportional-stratified-random sampling produced nearly identical numbers of federal and state cases within each broad category of litigants. Among non-class action cases, the percentages for federal and state cases are 52.2% and 47.8%, respectively; and, among

class action cases, the respective percentages for federal and state cases are 50.6% and 49.4%.<sup>899</sup>

The variable “Region of Country” reveals that nearly equal proportions of ordinary cases and class action cases were litigated in similar regions of the United States.<sup>900</sup> However, the variable labeled “Tribunal” illustrates the types of courts in which each case terminated or was decided ultimately.<sup>901</sup> Those percentages show some significant differences between the groups. Among both regular and class action cases, the “finality” for the greater majority cases occurred in appellate courts.<sup>902</sup> The reported percentages are 49.9% and 45.9%, respectively.<sup>903</sup> On the other hand, among the class action cases, 36.7% terminated in a trial or federal district court.<sup>904</sup> But 21.7% of the regular cases ended in a trial or district court.<sup>905</sup> These findings lend some credence to a prevailing argument that class actions are generally more difficult to litigate and win than regular lawsuits, because class complainants must face and overcome a substantial number of procedural hurdles even before a trial on the merits occurs.

Without doubt, the two most important variables appearing in Table A are “Plaintiffs’ Favorable Outcomes by Courts” and “Defendants’ Favorable Outcomes by Courts.” Consider the former variable. A comparison of regular and class action cases shows that aggrieved plaintiffs are likely to win nearly equal percentages of cases in trial/district courts—42.2% versus 42.4%.<sup>906</sup> Also, fairly equal percentages of regular and class action plaintiffs prevailed in appellate courts—47.3% versus 42.6%.<sup>907</sup> On the other hand, while 54.0% of plaintiffs won regular suits in state supreme courts, a lesser percentage (43.7%) of class action plaintiffs won in supreme courts.<sup>908</sup>

Now, consider the next variable “Defendants’ Favorable Outcomes by Courts” and the corresponding percentages. Right away, we learn two important facts. First, a comparison of regular and class action cases shows that defendants are likely to win nearly equal percentages of cases in trial/district courts—57.8% versus 57.6%.<sup>909</sup> An examination of de-

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<sup>899</sup> See *supra* Table A.

<sup>900</sup> See *supra* Table A.

<sup>901</sup> See *supra* Table A.

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<sup>903</sup> See *supra* Table A.

<sup>904</sup> See *supra* Table A.

<sup>905</sup> See *supra* Table A.

<sup>906</sup> See *supra* Table A.

<sup>907</sup> See *supra* Table A.

<sup>908</sup> See *supra* Table A.

<sup>909</sup> See *supra* Table A.



fendants’ appellate-court wins among non-class action and class action cases shows very similar results. The percentages are 52.7% and 57.4%, respectively.<sup>910</sup> Second, as the last row of percentages in Table A shows, 56.3% of the defendants prevailed in class actions which were decided ultimately in various supreme courts; however, multinational corporate entities and insurers’ success rate in various supreme courts was less (46.0%) when those entities were defendants in non-class action lawsuits.<sup>911</sup>

Finally when comparing all defendants’ outcomes to all plaintiffs’ outcomes, defending corporate entities and insurers are significantly more likely to win the majority of all lawsuits—regardless of whether the actions were regular actions or class action lawsuits.<sup>912</sup> Generally, across the various courts, plaintiffs’ and defendants’ aggregate successes are 45.4% and 54.6%, respectively.<sup>913</sup> Please note: two percentages were computed (1) by adding all of the “Plaintiffs’ Favorable Outcomes” percentages and dividing by six, and (2) by adding all of the “Defendants’ Favorable Outcomes” percentages and dividing by six.

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<sup>910</sup> See *supra* Table A.

<sup>911</sup> See *supra* Table A.

<sup>912</sup> See *supra* Table A.

<sup>913</sup> See *supra* Table A.